



ENTERED

F 2302

San Francisco Law Library

436 CITY HALL


No. 162070.

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov



3012

No. 15216

United States
Court of Appeals
for the Ninth Circuit

HUNT FOODS, INC., a Corporation,

Appellant,

vs.

WELLINGTON PHILLIPS and H. W. LIHOLM,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 266)

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED
DEC - 3 1956
PAUL P. O'BRIEN, CLERK

No. 15216

United States
Court of Appeals
for the Ninth Circuit

HUNT FOODS, INC., a Corporation,
Appellant,
vs.

WELLINGTON PHILLIPS and H. W. LIHOLM,
Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 266)

Appeal from the United States District Court for the
Northern District of California.
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer, Counter-Claim and Cross Complaint..	19
Ex. A—Statement in the Sum of \$11,495.16	27
B—Trade Acceptance No. 70452.....	29
C—Trade Acceptance No. 70453.....	29
D—Trade Acceptance No. 70454.....	29
Answer to Counter-Claim and Cross-Complaint	31
Bill of Costs on Behalf of Defendants.....	59
Bill of Costs on Behalf of Plaintiffs.....	57
Bond on Appeal.....	62
Certificate of Clerk to Record on Appeal.....	539
Counsel, Names and Addresses of.....	1
Docket Entries, Excerpt from.....	3
Findings of Fact and Conclusions of Law.....	36
Judgment	55
Judgment Form Submitted by Defendant.....	53
Motion to Dismiss and Motion for Judgment on the Pleadings	33
Notice of	33
Notice of Appeal.....	61

INDEX	PAGE
Order Denying Motion to Dismiss and Denying Motion for Judgment on the Pleadings.....	34
Order for Judgment.....	35
Petition for Removal.....	6
Complaint	9
Proposed Modifications to Draft of Plaintiffs' Findings of Fact and Conclusions of Law...	43
Statement of Points on Which Appellant In- tends to Rely on Appeal (USDC).....	65
Statement of Points on Which Appellant In- tends to Rely on Appeal and Designation of Record (USCA)	542
Transcript of Proceedings.....	75
Opening Statement on Behalf of Defendant	86
Opening Statement on Behalf of Plaintiff	77
Witnesses, Defendant's:	
Church, John L.	
—direct	468
—cross	485
—redirect	493
Cousins, Ward	
—direct	378
—cross	382
Erlanger, Hans	
—direct	335

INDEX

PAGE

Witnesses, Defendant's—(Continued)

Reid, W. J.

—direct 252

—cross 255

Steiger, Edward

—direct 496

—cross 500

—redirect 502

—recross 502

Witnesses, Plaintiff's:

Bivens, Col. Arthur L.

—direct 283

—cross 290

—redirect 291

Erlanger, Hans

—direct 341

—cross 342

—redirect 344

Mears, David L

—direct 368

—cross 374

—redirect 377

Miller, Lee

—direct 439

—cross 451

—redirect 455, 461

—recross 461

Witnesses, Plaintiff's—(Continued)

Phillips, L. W.

—direct	92, 271, 292, 506
—cross ...	154, 173, 226, 322, 345, 518
—redirect	245, 363
—recross	367

Steiger, Edward

—direct	402
—cross	424
—redirect	428
—recross	433

Willey, Norman C.

—direct	384
—cross	391
—redirect	397

Undertaking on Removal.....	17
-----------------------------	----

NAMES AND ADDRESSES OF COUNSEL

CUSHING, CULLINAN, DUNIWAY &
GORRILL,

1 Montgomery Street,
San Francisco 4,

Counsel for Appellant.

HANCOCK, ELKINGTON & ROTHERT,

111 Sutter Street,
San Francisco 4,

Counsel for Appellees.

EXCERPT FROM DOCKET ENTRIES

1954

Dec. 10—Filed petition on removal—copy of complaint and summons attached.

Dec. 10—Filed bond on removal in sum \$250.00.

* * *

1955

Jan. 10—Filed answer of Hunt Foods, Inc., with counterclaim and cross-claim.

Jan. 25—Filed answer of plaintiff to counterclaim and cross-claim of debts.

Feb. 2—Filed demand by plaintiff for jury trial.

* * *

Aug. 15—Ordered for trial Oct. 24, 1955.

* * *

Oct. 7—Filed notice and motion by defendant to dismiss or for judgment on pleadings, Oct. 17, 1955.

* * *

Oct. 24—Ordered after hearing, motions to dismiss and for judgment on pleadings, memos to be filed 5-5 days and motions continued to Nov. 4, 1955, for submission.

* * *

Nov. 22—Filed order denying motions to dismiss and for judgment on pleadings.

* * *

1955

- Nov. 28—Jury trial—plaintiff waived jury and was assessed fees (\$154.00). Evidence and exhibits introduced and further trial continued to Nov. 29, 1955.
- Nov. 29—Further trial. Evidence and exhibits introduced and further trial continued to Nov. 30, 1955.
- Nov. 30—Further trial. Evidence introduced and further trial continued to Dec. 1, 1955.
- Dec. 1—Further trial. Evidence and exhibits introduced and further trial continued to Dec. 2, 1955.
- Dec. 2—Further trial. Evidence and exhibits introduced, ruling on motion of defendant to dismiss reserved. Memos ordered filed 15-15-10 days and case continued to Jan. 14, 1956, for submission. Exhibits ordered returned to Clerk when briefs are filed.

* * *

1956

- Apr. 17—Filed order for judgment for plaintiff in sum \$21,500.00 and for defendant on cross-complaint for \$11,495.16.

* * *

- May 15—Lodged findings and conclusions by plaintiff.
- May 15—Lodged judgment by plaintiff.
- May 16—Filed Hunt Foods' proposed modifications to findings and conclusions with proposed judgment.

1956

June 7—Filed findings of fact and conclusions of law.

June 7—Entered judgment—filed June 7, 1956—
for Plaintiff vs. Hunt Foods, Inc., in sum
\$21,500.00 and costs, and for Hunt Foods
vs. Plaintiff on cross-complaint in sum
\$11,495.16.

June 13—Filed memo of costs by plaintiff (\$296.62).

June 13—Filed supersedeas bond of Hunt Foods
Co. in sum \$12,000.00. “Approved June
13, 1956; Louis E. Goodman, U. S. Dis-
trict Judge.”

June 14—Filed memo of costs by defendant
(\$620.40).

June 14—Costs allowed plaintiff \$97.35.

* * *

June 18—Filed notice of appeal by defendants.

* * *

June 27—Filed appellant’s designation of record on
appeal.

June 27—Filed statement of points upon which ap-
pellant intends to rely on appeal.

* * *

July 5—Filed appellee’s designation of record on
appeal.

* * *

In the United States District Court for the Northern District of California, Southern Division

No. 34288

WELLINGTON PHILLIPS and H. W. LIHOLM,
Plaintiffs,

vs.

HUNT FOODS, INC., a Corporation; JOHN DOE, RICHARD ROE, XYZ CORPORATION, a Corporation, and BLACK & WHITE COMPANY,
Defendants.

PETITION FOR REMOVAL

To the Honorable, the United States District Court for the Northern District of California, Southern Division:

The petition of Hunt Foods, Inc., a corporation, respectfully shows:

I.

Petitioner is one of the defendants in an action entitled as above which was commenced by the above-named plaintiffs against the above-named defendants in the Superior Court of the State of California in and for the County of Alameda. Said action was filed on November 12, 1954, being numbered 261,524 in the files of said Court and is now pending.

II.

Attached to the original herewith and made a part of this Petition as though set forth in full are full, true and correct copies of all process, pleadings and

orders heretofore served upon petitioner in said action, Petitioner was served with Summons and Complaint in said action on November 30, 1954. Petitioner has not filed or served any Answer, Demurrer or other pleading or motion in said action, and petitioner's time to answer or plead to the Complaint in said action will expire on December 10, 1954.

III.

Said action is of a civil nature and the amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs.

IV.

At the time of the commencement of said action, petitioner was and at all times thereafter has been and now is a corporation, organized and existing under the laws of the State of Delaware, and as such is a resident and citizen of the State of Delaware, and not a resident or citizen of the State of California.

V.

Defendants above-named are the only defendants in said action. The names of all defendants, except that of petitioner, are fictitious names.

VI.

Petitioner desires to remove said action to this Court as permitted by law.

VII.

Petitioner presents and files herewith a bond with good and sufficient surety conditioned that peti-

tioner will pay all costs and disbursements incurred by reason of removal proceedings should it be determined that said action was not removable or was improperly removed.

VIII.

November 30, 1954, was the date upon which petitioner first received the said Summons and Complaint.

Wherefore, petitioner prays that this Court accept and approve this petition and said bond and surety; that said action stand removed; that this Court issue all necessary orders and process to bring before it all proper parties to this action, whether served by process issued by said State Court or otherwise; that this Court take and retain jurisdiction over the entire cause and determine all issues involved in said action; and for such other and further orders as may be just.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Petitioner.

Duly verified.

In the Superior Court of the State of California,
in and for the County of Alameda

No. 261,524

WELLINGTON PHILLIPS and H. W. LI-
HOLM, Plaintiffs,

vs.

HUNT FOODS, INC., a Corporation; JOHN
DOE, RICHARD ROE, XYZ CORPORA-
TION, a Corporation, and BLACK & WHITE
COMPANY, Defendants.

COMPLAINT FOR DAMAGES FOR
BREACH OF CONTRACT

Now comes plaintiffs above-named and for their
First Cause of Action against the above-named de-
fendants, and each of them, allege as follows:

I.

At all times herein mentioned plaintiff Wellington Phillips and plaintiff L. W. Liholm were, and they now are doing business under the name of Wellington Phillips & Co., and engaged in the general business of selling various products to military and governmental agencies, with their office in the City and County of San Francisco, State of California.

II.

The true names of the defendants sued herein under the names of John Doe, Richard Roe, XYZ Corporation, a corporation, and Black & White

Company, are, and each of them is, unknown to plaintiffs, and the said names are fictitious names. Plaintiffs pray leave to amend this complaint by inserting herein the true name of each said defendant when said true name is ascertained.

III.

At all times herein mentioned Hunt Foods, Inc., was and now is a corporation qualified to engage in and engaging in the business of manufacturing and selling canned food and other foodstuffs in the State of California and elsewhere.

IV.

In the month of November, 1951, in the County of Alameda, State of California, the exact date of which is now unknown to plaintiffs, plaintiffs and defendants entered into an oral agreement which provided as follows:

1. Defendants appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber and representative of defendants for sales of products of the defendants to all military stations, camps, posts and other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California and to the military purchasing offices in San Francisco, California, and in Northern California for overseas bases, and overseas units and to military ships making purchases in Northern California and for direct sales to overseas military units, bases and installations.

2. Defendants appointed plaintiffs as said exclusive military service jobber and representative for a period of ten years from the date of said oral agreement.

3. Plaintiffs' compensation for acting as said exclusive military service jobber, agent and representative was to be whatever profit plaintiffs made in purchasing defendants' products and reselling the same as said military service jobber and representative.

4. Plaintiffs agreed to promote the sales of the food products of defendants pursuant to said agreement.

V.

Prior to and at the time of the making of said oral agreement plaintiffs informed defendants that in order fully to promote and increase the volume of the sales of defendants' products as exclusive military service jobber and representative in the area aforesaid (1) plaintiffs would for approximately two years sell defendants' products at about plaintiffs' cost, or below cost, and without substantial profit and would expect and plan to sell defendants' products at a normal profit when said volume of sales of defendants' products had been increased about two years subsequent to December 1, 1951, and (2) plaintiffs would decrease and eventually abandon plaintiffs' activity in plaintiffs' prior business of bidding for military purchases of various products sold by plaintiffs either as a broker or as sales agent prior to December 1, 1951. At said

time prior to the making of said oral agreement plaintiffs also informed defendants that plaintiffs would give up and release certain capital funds necessary in the conduct of said bidding business but not necessary in the performance of said oral contract with defendants.

VI.

During the period from December 1, 1951, to the month of May, 1953, plaintiffs did substantially abandon plaintiffs' activity in said former bidding business in order fully to perform said oral agreement and did give up and release \$10,000 of capital funds formerly used in said prior bidding business and did, in order to promote the sales of defendants' products, sell large quantities of defendants' products at, or about cost and below cost, without substantial profit.

VII.

In March or April, 1953, the exact date of which is unknown to plaintiffs, defendants, and each of them, violated and breached said oral agreement in that said defendants at said time authorized and appointed another business firm to represent defendants as exclusive military service agents and sales representatives to sell defendants' products in sales to the military units, bases, posts, establishments, ships purchasing offices and installations in Northern California and overseas hereinabove mentioned in Paragraph IV.

VIII.

At all times from the making of said oral agree-

ment in November, 1951, to and including about the 1st of May, 1953, plaintiffs duly and fully performed each and all of the obligations on plaintiffs' part to perform under said oral agreement.

IX.

As a result of the sale by plaintiffs of defendants' products without substantial profit during the period from December 1, 1951, to May 1, 1953, as aforesaid, plaintiffs' business credit has been, and now is, damaged and impaired. As a result of the release by plaintiffs of capital funds as aforesaid plaintiffs have at all times subsequent to May 1, 1953, had no substantial funds with which to finance or renew plaintiffs' former business of bidding for military purchases and as a result of plaintiffs' said damaged and impaired business credit plaintiffs have at all times since May 1, 1953, and now are, unable to borrow any adequate or substantial funds for said purpose and have been unable to renew or carry on said prior business of bidding for military purchases.

X.

At the times plaintiffs informed defendants that plaintiffs planned to sell defendants' products at or below cost for a period of two years and planned to decrease and eventually abandon plaintiffs' prior bidding business and to give up and release certain capital funds, as more fully alleged hereinabove in paragraph V, defendants, and each of them, approved and consented to each and all of the said

plans about which plaintiffs informed defendants, and each of them, as aforesaid.

XI.

As a direct and proximate result of the said breach and violation of said oral agreement by defendants, and each of them, as aforesaid, plaintiffs were damaged in the sum of \$380,000 in that plaintiffs were deprived of the opportunity and contractual right, for a period of about eight years from and after said breach and violation of said oral agreement, to earn a reasonable or any profit in the performance of said oral agreement. Plaintiffs are informed and believe, and upon such information and belief allege, that plaintiffs have been damaged in the sum of \$10,000 for the first year subsequent to May 1, 1953, in the sum of \$35,000 for each of the second and third years subsequent to May 1, 1953, and in the sum of \$60,000 in each of the fourth, fifth, sixth, seventh, and eight years subsequent to May 1, 1953.

As and for a Second, Separate and Distinct Cause of Action Against Defendants, and Each of Them, Plaintiffs Allege as follows:

I.

Plaintiffs refer to and incorporate herein and make a part hereof as fully as if set out in full herein each and all of plaintiff's allegations hereinabove contained in paragraphs I, II and III of the First Cause of Action contained in this complaint.

II.

In the month of November, 1951, in the County of Alameda, State of California, the exact date of which is now unknown to plaintiffs, plaintiffs and defendants entered into an oral agreement which provided as follows:

1. Defendants appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber and representative of defendants for sales of products of the defendants to all military stations, camps, posts and other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California and to the military purchasing offices in San Francisco, California, and in Northern California for overseas bases, and overseas units and to military ships making purchases in Northern California and for direct sales to overseas military units, bases and installations.

2. Defendant appointed plaintiffs as said exclusive military service jobber and representative for an indefinite and reasonable period of time from the date of said oral agreement.

3. Plaintiffs' compensation for acting as said exclusive military service jobber, agent and representative was to be whatever profit plaintiffs made in purchasing defendants' products and reselling the same as said military service jobber and representative.

4. Plaintiffs agreed to promote the sale of the

food products of defendants pursuant to said agreement.

III.

Plaintiffs refer to and incorporate herein and make a part hereof as fully as if set out in full herein each and all of the allegations hereinabove contained in paragraphs V, VI, VII, VIII, IX and X of the First Cause of Action contained in this complaint.

IV.

Plaintiffs are informed and believe, and upon such information and belief allege, that a reasonable time for the performance of the said oral agreement hereinabove alleged, then was and now is a period of ten years.

VI.

As a direct and proximate result of the violation and breach of said oral agreement by defendants, and each of them, as aforesaid, plaintiffs were damaged in the sum of \$380,000. Plaintiffs are informed and believe, and upon such information and belief allege, that plaintiffs were damaged in the sum of \$10,000 for the first year subsequent to May 1, 1953, \$35,000 for each of the second and third years subsequent to May 1, 1953, and in the sum of \$60,000 in each of the fourth, fifth, sixth, seventh and eighth years subsequent to May 1, 1953.

Wherefore, plaintiffs pray judgment against defendants, and each of them, for the sum of Three Hundred Eighty Thousand Dollars (\$380,000), for plaintiffs' costs of suit incurred herein and for such

other and further relief as the Court deems meet and equitable in the premises.

HANCOCK, ELKINGTON &
ROTHERT,
Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed November 12, 1954.

[Endorsed]: Filed December 10, 1954, U.S.D.C.

[Title of District Court and Cause.]

UNDERTAKING ON REMOVAL

Know All Men by These Presents:

That Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania and duly authorized to transact a general surety business in the State of California, is held and firmly bound unto the plaintiffs above named and each of them in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, for the payment of which said sum well and truly to be made unto the said plaintiffs the said Indemnity Insurance Company of North America binds itself, its successors, representatives and assigns firmly by these presents.

The condition of the above obligation is such that whereas Hunt Foods, Inc., a corporation, is about to file its petition in the United States District

Court for the Northern District of California for the removal of a certain cause pending in the Superior Court of the State of California in and for the County of Alameda and numbered 261524, wherein the above-named plaintiffs are all the parties plaintiff and wherein said Hunt Foods, Inc., is one of the parties defendant, to the United States District Court for the Northern District of California;

Now, Therefore, if the said Hunt Foods, Inc., shall well and truly pay all costs and disbursements incurred by reason of said removal proceedings, should it be determined that said suit was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof said Indemnity Insurance Company of North America has caused these presents to be signed and its corporate seal to be affixed this 9th day of December, 1954.

[Seal]

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,

By /s/ G. B. FOSTER,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 9th day of December, in the year one thousand nine hundred and fifty-four, before me,

Alice Browne, a Notary Public in and for the City and County of San Francisco, personally appeared G. B. Foster, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-Fact.

[Seal] /s/ ALICE BROWNE,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 28, 1956.

[Endorsed]: Filed December 10, 1954.

[Title of District Court and Cause.]

ANSWER, COUNTERCLAIM AND
CROSS-COMPLAINT

Defendant, Hunt Foods, Inc., a corporation, answering the Complaint of plaintiffs, admits, denies and alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs I and II of the first cause of action.

II.

Answering the allegations in paragraph IV of the First Cause of Action, defendant denies each and all

the allegations therein contained except as herein in this paragraph expressly alleged and in that respect defendant alleges that: prior to November 26, 1951, defendant's salesmen sold its products to United States Government Commissary Stores in the San Francisco Bay Area and southerly to Paso Robles, all in the State of California, hereinafter referred to as the San Francisco Area. On or about November 26, 1951, defendant designated plaintiffs as its representative to sell its products to Government Commissary Stores in said San Francisco Area, under an arrangement whereby plaintiffs were to purchase merchandise from defendant at defendant's regular price to customers, receiving a cash discount only, and thence plaintiffs were to resell to said Government Commissary Stores. A small credit line was given by defendant to plaintiffs on a ten-day basis. Thereafter defendant sold merchandise to plaintiffs under said arrangement, but during the month of January, 1952, and continuously thereafter, plaintiffs neglected to pay defendant according to said arrangement and the amount in default gradually increased so that on or about May 12, 1952, plaintiffs were indebted to defendant for merchandise sold by defendant to plaintiffs under said arrangement in a sum in excess of \$19,000, all of which indebtedness was in default and which plaintiffs were unable to pay or satisfy. On May 12, 1952, as security for defendant, plaintiffs executed in writing an assignment to defendant of certain specific accounts receivable, totaling \$17,754.21, and of all amounts which may become due there-

after to plaintiffs arising out of resales of goods, wares and merchandise purchased by plaintiffs from defendant. Thereafter plaintiffs collected said specific accounts and other accounts covered by said assignment but failed, neglected and refused to pay the same to defendant, and defendant is informed and believes and therefore alleges that plaintiffs used some or all of said sums for the personal benefit and comfort of plaintiffs. By the wilful and deliberate acts of plaintiffs, said security was rendered valueless and is now of no value whatsoever. On or about April 23, 1953, the indebtedness of plaintiffs to defendant for goods and merchandise sold amounted to \$27,388.85, all of which indebtedness was in default and which plaintiffs were unable to pay or satisfy. On or about April 24, 1953, defendant notified plaintiffs that defendant would no longer sell its merchandise to plaintiffs for sale to Government Commissary Stores.

III.

Answering the allegations in paragraph V of the First Cause of Action, defendant denies each and all the allegations therein contained.

IV.

Answering the allegations in paragraphs VI, VII and VIII of the First Cause of Action, defendant denies that there was at any time an oral contract as alleged in the Complaint; denies that there was at any time any breach by defendant of any contract, and alleges that the arrangement between plaintiffs and defendant was that alleged in para-

graph II above in this answer. Defendant admits that as of May 1, 1953, it appointed a business firm other than plaintiffs to handle sale of defendant's products to Government Commissary Stores in the said San Francisco Area and elsewhere in the world. As to all allegations in said paragraphs VI, VII and VIII not herein expressly denied or admitted, defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations.

V.

Answering the allegations of paragraph IX of the First Cause of Action, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein. Defendant alleges that the impairment, if any, of plaintiffs' credit, capital and business, or any of them, was and is caused by acts of the plaintiffs and was not directly or indirectly in any manner caused by any act or omission of defendant.

VI.

Answering the allegations of paragraph X of the First Cause of Action, defendant denies each and all the allegations therein contained.

VII.

Answering the allegations of paragraph XI of the First Cause of Action, defendant denies that plaintiffs have been damaged in any amount by any act or omission of defendant; denies that there was ever an agreement between the parties as alleged in said Complaint and denies that defendant at any

time breached any alleged agreement between the parties. As to all allegations in said paragraph XI not expressly denied herein, defendant is without knowledge or information sufficient to form a belief as to the truth of such allegations.

Answer to Second Cause of Action

I.

Answering the allegations of paragraph I of the Second Cause of Action, defendant refers to and incorporates herein as if set forth in full, each and all of the denials, admissions and allegations contained in paragraph I of the answer to the First Cause of Action.

II.

Answering the allegations of paragraph II of the Second Cause of Action, defendant refers to and incorporates herein and makes a part hereof as fully as if set forth in full, each and all of defendant's denials and allegations hereinabove contained in paragraph II of the answer to the First Cause of Action.

III.

Answering the allegations of paragraph III of the Second Cause of Action, defendant refers to and incorporates herein and makes a part hereof each and all the denials and allegations contained in paragraphs III and IV of the answer to the First Cause of Action.

IV.

Answering the allegations contained in paragraph

IV of the Second Cause of Action, defendant denies each and all the allegations therein contained.

V.

Answering the allegations contained in paragraph V of the Second Cause of Action (designated as paragraph VI in the Complaint) defendant denies each and all the allegations therein contained, and further denies that any act or omission of defendant at any time caused any loss or damage to plaintiffs.

Separate Defense

The purported agreement mentioned in the Complaint by which defendant is sought to be charged was and is by its allegations not to be performed within one year from the making thereof; was never subscribed by the defendant or its agent in writing, nor was there any note or memorandum thereof subscribed by defendant or its agent.

First Affirmative Defense, Counterclaim and Cross-Complaint

Plaintiffs owe defendant \$11,495.16 for goods sold and delivered by defendant to plaintiffs between December 1, 1951, and August 10, 1953.

Second Affirmative Defense, Counterclaim and Cross-Complaint

Ever since July 8, 1953, and now, plaintiffs owe defendant \$11,495.16 according to an open account between the parties, which sum plaintiffs agreed to pay to defendant but have neglected and refused

and still neglect and refuse to pay the said sum or any part thereof.

Third Affirmative Defense, Counterclaim and Cross-Complaint

On November 1, 1954, an account was stated by and between defendant and plaintiffs, under and by virtue of which plaintiffs are indebted to defendant in the sum of \$11,495.16, no part of which has been paid. A copy of said account stated, is attached hereto, marked "Exhibit A" and made a part hereof.

Fourth Affirmative Defense, Counterclaim and Cross-Complaint

I.

On July 14, 1953, plaintiffs accepted three trade acceptances numbered, respectively, 70,452, 70,453, and 70,454. Said trade acceptances were made by defendant on July 8, 1953, and, respectively, required plaintiffs to pay to the defendant as follows: under trade acceptance #70,452, the sum of \$4,439.79 on October 1, 1953; under trade acceptance #70,453, the sum of \$4,439.79 on November 1, 1953; under trade acceptance #70,454 the sum of \$4,439.79 on December 1, 1953. A copy of each trade acceptance is hereto annexed, marked Exhibits B, C and D, respectively, and is hereby made a part hereof as if set forth in full.

II.

Plaintiffs paid to defendant \$1,824.21 only on account of said trade acceptance number 70,452, and

plaintiffs owe to defendant \$2,615.55, the balance due and unpaid on said trade acceptance.

III.

Plaintiffs owe to defendant the full amount of each of said trade acceptances numbered 70,453 and 70,454, to wit: \$8,879.58.

IV.

In each of said trade acceptances plaintiffs agreed to pay all costs of collection including attorneys' fees which defendant may incur in collection thereon. Defendant is informed and believes and therefore alleges that costs and attorneys fees in collection thereof will amount to not less than \$2,500, the exact amount being now unknown.

Wherefore, defendant prays that:

1. Plaintiffs take nothing by their Complaint;

2. This Court award judgment in favor of defendant and against plaintiffs in the sum of \$11,-495.16, together with interest thereon at the legal rate of interest as follows: on said trade acceptance No. 70,452, on \$2,615.55 from October 1, 1953; on trade acceptance No. 70,453 on the full amount thereof from November 1, 1953, and on said trade acceptance No. 70,454 on the full amount thereof from December 1, 1953;

3. This Court award to defendant its costs and attorneys' fees in the sum of \$2,500.00 or such

greater or lesser amount as may be established to the satisfaction of the Court.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant,
Hunt Foods, Inc.

Duly verified.

EXHIBIT A

Statement

Hunt Foods, Inc.

To: Wellington Phillips & Co. (A Partnership)
915 Bryant Street,
San Francisco, California.

Date: November 1, 1954.

Date	Reference	Debit	Credit	Balance
Balance on Trade Acceptances				
July 3, 1953		\$22,198.94		
The following payments have been received:				
8/19/53			\$1,198.94	
9/ 3/53			1,000.00	
9/ 4/53			500.00	
9/21/53			750.00	
9/25/53			750.00	
9/30/53			240.85	
11/16/53			1,000.00	
11/27/53			1,500.00	
1/ 6/54			2,000.00	
4/21/54			576.49	
5/10/54			587.50	
6/ 9/54			200.00	
9/13/54			400.00	

Balance due on Trade Acceptances:

11/ 1/54	\$11,495.16
#70452	
#70453	
#70454	

Statement

Hunt Foods, Inc.

To: Wellington Phillips & Co. (A Partnership)
 915 Bryant Street,
 San Francisco, California.

Date: November 1, 1954.

Date	Reference	Debit	Credit	Balance
------	-----------	-------	--------	---------

Statement of Unpaid Trade Acceptances

Trade Acceptance

#70452 \$4,439.79

The following payments received have
 been applied against Trade Ac-
 ceptance #70452:

Balance of payment rec'd. 1/6/54 \$ 60.22

4/21/54 576.49

5/10/54 587.50

6/ 9/54 200.00

9/13/54 400.00

Balance due on Trade

Acceptance #70452 \$ 2,615.58

Trade Acceptance #70453 4,439.79

Trade Acceptance #70454 4,439.79

Total Due \$11,495.16

29

0152

EXHIBIT B

INVOICE NUMBER BALANCE ON ACCOUNT AS OF
7/8/53 (SEE STATEMENT)

FULLERTON, CALIFORNIA

DATE 7/8/53

195

ON 10/1/53

(DATE OF MATURITY)

PAY TO THE ORDER OF OURSELVES

THOUSAND FOUR HUNDRED THIRTY NINE AND 79/100

DOLLARS (\$ 4439.79)ACTION WHICH GIVES RISE TO THIS INSTRUMENT IS THE PURCHASE OF GOODS BY THE ACCEPTOR FROM THE DRAWER. SHOULD DEFAULT BE MADE IN PAY-
MATURITY DATE, THE DRAWEE AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING ATTORNEY'S FEES WHICH DRAWER MAY INCUR IN COLLECTION OF THIS
ACCEPTANCE.

WELLINGTON PHILLIPS & CO (A PARTNERSHIP)

(NAME OF DRAWEE)

5 BRYANT ST

(STREET ADDRESS)

SAN FRANCISCO 3 CALIFORNIA

(CITY OF DRAWEE)

TION

ACCEPTED

DATE 7-14-53

Wellington Phillips & Co.

BY B. P. Kariger

Partner

HUNT FOODS, INC.

B. P. Kariger

(AUTHORIZED SIGNATURE OF DRAWER)

0153

EXHIBIT C

INVOICE NUMBER BALANCE ON ACCOUNT AS OF
7/8/53 (SEE STATEMENT)

FULLERTON, CALIFORNIA

DATE 7/8/53

195

ON 11/1/53

(DATE OF MATURITY)

PAY TO THE ORDER OF OURSELVES

THOUSAND FOUR HUNDRED THIRTY NINE AND 79/100

DOLLARS (\$ 4439.79)ACTION WHICH GIVES RISE TO THIS INSTRUMENT IS THE PURCHASE OF GOODS BY THE ACCEPTOR FROM THE DRAWER. SHOULD DEFAULT BE MADE IN PAY-
MATURITY DATE, THE DRAWEE AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING ATTORNEY'S FEES WHICH DRAWER MAY INCUR IN COLLECTION OF THIS
ACCEPTANCE.

WELLINGTON PHILLIPS & CO (A PARTNERSHIP)

(NAME OF DRAWEE)

5 BRYANT ST

(STREET ADDRESS)

SAN FRANCISCO 3 CALIFORNIA

(CITY OF DRAWEE)

TION

ACCEPTED

DATE 7-14-53

Wellington Phillips & Co.

BY B. P. Kariger

Partner

HUNT FOODS, INC.

B. P. Kariger

(AUTHORIZED SIGNATURE OF DRAWER)

0154

EXHIBIT D

INVOICE NUMBER BALANCE ON ACCOUNT AS OF
7/8/53 (SEE STATEMENT)

FULLERTON, CALIFORNIA

DATE 7/8/53

195

ON 12/1/53

(DATE OF MATURITY)

PAY TO THE ORDER OF OURSELVES

THOUSAND FOUR HUNDRED THIRTY NINE AND 79/100

DOLLARS (\$ 4439.79)ACTION WHICH GIVES RISE TO THIS INSTRUMENT IS THE PURCHASE OF GOODS BY THE ACCEPTOR FROM THE DRAWER. SHOULD DEFAULT BE MADE IN PAY-
MATURITY DATE, THE DRAWEE AGREES TO PAY ALL COSTS OF COLLECTION INCLUDING ATTORNEY'S FEES WHICH DRAWER MAY INCUR IN COLLECTION OF THIS
ACCEPTANCE.

WELLINGTON PHILLIPS & CO (A PARTNERSHIP)

(NAME OF DRAWEE)

5 BRYANT ST

(STREET ADDRESS)

SAN FRANCISCO 3 CALIFORNIA

(CITY OF DRAWEE)

TION

ACCEPTED

DATE 7-14-53

Wellington Phillips & Co.

BY B. P. Kariger

Partner

HUNT FOODS, INC.

B. P. Kariger

(AUTHORIZED SIGNATURE OF DRAWER)

Endorsed F. P. Kariger January 17, 1954

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM AND
CROSS-COMPLAINT

Now comes Wellington Phillips and H. W. Liholm, plaintiffs above named, and for their answer to the Counterclaim and Cross-Complaint of Defendant Hunt Foods, Inc., a corporation, admit, deny and aver as follows:

I.

Answering the First Affirmative Defense, Counter-Claim and Cross-complaint, plaintiffs deny generally and specifically, each and every, all and singular, the allegations thereof.

II.

Answering the Second Affirmative Defense, Counterclaim and Cross-Complaint plaintiffs deny generally and specifically, each and every, all and singular, the allegations thereof.

III.

Answering the Third Affirmative Defense, Counterclaim and Cross-Complaint plaintiffs admit that on November 1, 1954, an account was stated by and between defendant and plaintiff showing that plaintiffs were indebted to defendant in the sum of \$11,-495.16, no part of which has been paid and that a copy of said account stated is attached to the Answer of defendant Hunt Foods, Inc., and marked Exhibit "A."

IV.

Answering the Fourth Affirmative Defense, Counterclaim and Cross-Complaint plaintiffs admit the allegations of paragraphs I, II, and III thereof and in this connection aver that on July 14, 1953, plaintiffs also accepted two additional trade acceptances numbered 70450 and 70451 in the sum of \$4,439.79 and \$4,439.78, respectively, and paid off said trade acceptances subsequent to July 14, 1953, and deny generally and specially, each and every, all and singular, the remaining allegations contained in said Fourth Affirmative Defense, Counterclaim and Cross-complaint not hereinabove specifically admitted.

Wherefore, plaintiffs pray that defendant Hunt Foods, Inc., take nothing by its Answer, Counterclaim and Cross-Complaint herein and that plaintiffs have judgment herein against said defendant as prayed in the complaint herein.

HANCOCK, ELKINGTON &
ROTHERT,

/s/ HARLOW P. ROTHERT.

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed January 25, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS AND MOTION FOR
JUDGMENT ON THE PLEADINGS

The defendant, Hunt Foods, Inc., a corporation,
moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against this defendant upon which relief can be granted.
2. For a judgment on the pleadings in favor of this defendant in the sum of \$11,495.16, together with costs and reasonable attorneys' fees.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant,
Hunt Foods, Inc.

Notice of Motion

To the Plaintiffs above named and to Harlow P.
Rothert, Esq., and Hancock, Elkington & Roth-
ert, their attorneys:

Please take notice that the undersigned will bring the above motions on for hearing before the above-entitled Court on October 17, 1955, in the Department of the Presiding Judge in the above-entitled Court at 10:00 o'clock a. m. in the Federal Court, Post Office Building, Seventh and Mission Streets,

in the City and County of San Francisco, State of California. Said motions will be made pursuant to Rule 12 of the Rules of Civil Procedure of the United States District Courts and will be based upon records and files in the above-entitled action.

Dated: October 7, 1955.

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant,
Foods, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
AND DENYING MOTION FOR JUDG-
MENT ON THE PLEADINGS

This matter having been argued, briefed and submitted for ruling,

It is ordered that defendants' motion to dismiss be, and the same hereby is, denied;

It is further ordered that defendants' motion for judgment on the pleadings be, and the same hereby is, denied.

Dated: November 22, 1955.

/s/ GEORGE B. HARRIS,

United States District Judge.

Tuek v. Gudnason,

11 C. A. 2d 626.

[Endorsed]: Filed November 22, 1955.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

In this diversity case, Phillips seeks damages against Hunt Foods, Inc., for breach of contract. It is admitted that the amount sought by Hunt in its cross-complaint, viz. \$11,495.16, is owing and unpaid.

Approximately 120 pages of briefs have been filed. To resolve the many questions of California law tendered would require a judicial excursion which would take the Court too far away from its many other litigants. But this is not necessary. We need not determine these many questions. As is sometimes the case, the legal arguments have obscured the facts. And this case can be justly decided on the facts. It is not substantially dissimilar to *Millet v. Park & Tilford*, 127 Fed. Supp. 494 (Judge Murphy).

It is my opinion that, upon the evidence, there was an oral contract between Phillips and Hunt evidenced by some written memoranda, that it was

to continue for a reasonable time, that recovery is not prevented by the Statute of Frauds, and that long before a reasonable time had elapsed, Hunt unfairly terminated the contract, not because of any real default on the part of Phillips, but because Hunt thought there was more profit or benefit elsewhere.

Phillips was damaged. His damages are difficult of ascertainment; in part, they are speculative. Upon the most reasonable basis of computation available, I approximate as a just amount of such damage, the sum of \$21,500.00.

Judgment will therefore go in favor of plaintiff, upon findings to be submitted pursuant to Rules, in the sum of \$21,500.00. Defendant will have judgment on the cross-complaint in the sum of \$11,495.16.

Dated: April 17, 1956.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on November 28, 1955, and was tried before the court sitting without a jury, Honorable Louis E.

Goodman presiding, on November 28, 29, and 30, and December 1, 1955; plaintiffs appearing by Wellington Phillips and by their attorney, Harlow P. Rothert, Esq., defendant Hunt Foods, Inc., a corporation, appearing by its attorneys Vincent Culinan, Esq., and Ben C. Duniway, Esq., and oral and written evidence having been adduced the matter having been submitted upon briefs for the court's decision and the Court being fully advised hereby makes the following findings of fact:

Findings of Fact

I.

It is true that plaintiffs Wellington and Phillips and H. W. Liholm were at all times mentioned in the complaint herein partners doing business under the name of Wellington Phillips & Co. and engaged in the business of selling various products to military and governmental agencies with their offices in the City and County of San Francisco, State of California.

II.

It is true that at all times mentioned in said complaint Hunt Foods, Inc., was a corporation qualified to engage in, and engaging in the business of manufacturing and selling canned food and other foodstuffs in the State of California and elsewhere.

III.

It is true that during the period from September 1, 1951, to November 30, 1951, plaintiffs and defendant Hunt Foods, Inc., a corporation, made and en-

tered into an oral agreement which provided as follows:

1. Said defendant appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber and representative of defendant for sales of defendant's products to all military stations, camps, posts, post exchanges and other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California.

2. Defendant appointed plaintiffs as said exclusive military service jobber and representative for an unspecified period of time commencing on December 1, 1951.

3. The compensation of plaintiffs for acting as said exclusive military service jobber, agent and representative was to be whatever profit plaintiffs made in purchasing defendant's products and reselling the same as said military service jobber and representative.

4. Plaintiffs agreed to promote the sale of defendant's food products pursuant to said agreement and to perform the duties and obligations of exclusive military service jobber, representative and agent for defendant in sales to said military stations, camps, posts, post exchanges and other military installations in Northern California.

IV.

It is true that prior to and at the time of making said oral agreement plaintiffs informed defendant

Hunt Foods, Inc., a corporation, that in order to fully promote and increase the volume of sales of defendant's products as said exclusive military service jobber and representative in Northern California plaintiffs would (1) for approximately two years sell defendant's products to said military installations at about plaintiffs costs and without substantial profit and would expect and plan to sell defendant's products at a normal profit after the elapse of approximately two years from the commencement of the performance of said oral contract, and (2) plaintiffs would decrease and eventually abandon plaintiffs' activity in plaintiffs' prior business of bidding for military purchases of various products sold by plaintiffs prior to December 1, 1951.

V.

During the period from December 1, 1951, to the month of May, 1953, plaintiffs did substantially abandon plaintiffs' activity in said former bidding business in order to fully promote the sales of defendant's products during said period and in order to perform said oral agreement and did sell large quantities of defendant's products to said military installations at about plaintiffs' costs and without substantial gross profit.

VI.

On or about April 25, 1953, defendant Hunt Foods, Inc., a corporation, violated and breached said oral agreement in that said defendant at said time authorized and appointed another business

firm to represent defendant as exclusive military service agent and sales representative to sell defendant's products to said military installations in Northern California and notified plaintiffs that plaintiffs' exclusive authority to act as said exclusive military service jobber and representative was terminated.

VII.

At all times from the making of said oral agreement to, and including, about the 25th day of April, 1953, plaintiffs duly and fully performed each and all of the obligations on plaintiffs' part to perform under said oral agreement.

VIII.

As a result of the sale by plaintiffs of defendant's products at about plaintiffs' costs and without substantial gross profit during the period from December 1, 1951, to about April 25, 1953, plaintiffs incurred substantial losses during said period and plaintiffs' business credit became damaged and impaired and plaintiffs were unable subsequent to April 25, 1953, to renew said prior business of bidding for military purchases.

IX.

At the times when plaintiffs informed defendant concerning plaintiffs' intention and plan as hereinabove found in paragraph IV defendant approved and consented to said plans and intentions of plaintiffs.

X.

As a direct and proximate result of said breach and violation of said oral agreement by defendant Hunt Foods, Inc., a corporation, plaintiffs were damaged. The damages are difficult of ascertainment. Upon the most reasonable basis of computation available, the damages of plaintiffs are fixed at the sum of \$21,500.00.

XI.

Except as hereinabove found to be true each and all of the allegations contained in plaintiffs' complaint herein are untrue.

XII.

It is true that on or about July 14, 1953, plaintiffs accepted three trade acceptances numbered respectively 70452, 70453, and 70454, which said trade acceptances obligated plaintiffs to pay to defendant Hunt Foods, Inc., a corporation, respectively, the sum of \$4,439.79 on October 1, 1953, the sum of \$4,439.79 on November 1, 1953, and the sum of \$4,439.79 on December 1, 1953. It is true that plaintiffs paid the defendant the sum of \$1,824.21 on account of said trade acceptance No. 70452 and it is true that the remaining unpaid balance due and owing from plaintiffs to said defendant upon said trade acceptances is the sum of \$11,495.16.

XIII.

Except as hereinabove specifically found to be true herein each and all of the allegations contained in the Answer, Counterclaim and Cross-Complaint of Hunt Foods, Inc., a corporation, are untrue.

Conclusions of Law

Based upon the above Findings of Fact the Court adopts the following Conclusions of Law herein:

I.

Plaintiffs are entitled to a judgment upon plaintiffs' complaint herein against defendant Hunt Foods, Inc., a corporation, in the sum of \$21,500 together with plaintiffs' costs of suit incurred herein.

II.

Defendant Hunt Foods, Inc., a corporation, is entitled to a judgment against plaintiffs, and each of them, upon said defendant's cross-complaint herein in the sum of \$11,495.16.

Let judgment be entered accordingly.

Dated: June 7th, 1956.

/s/ LOUIS E. GOODMAN,

United States District Judge.

Disapproved as to form.

Dated: May 11, 1956.

CUSHING, CULLINAN,

DUNIWAY & GORRILL,

/s/ VINCENT CULLINAN,

Attorneys for Defendant Hunt Foods, Inc., a Corporation.

Lodged May 15, 1956.

[Endorsed]: Filed June 7, 1956.

[Title of District Court and Cause.]

PROPOSED MODIFICATIONS TO DRAFT OF
PLAINTIFFS' FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Defendant, Hunt Foods, Inc., submits herewith its proposed modifications to the findings of fact and conclusions of law proposed by plaintiffs.

1.

Proposed Modification of Finding I:

"It is true that plaintiffs Wellington Phillips and H. W. Liholm and Overseas Finance and Trading Co., were at all times mentioned in the complaint herein partners doing business under the name of Wellington Phillips & Co. and engaged in the business of selling various products to military and governmental agencies with their offices in the City and County of San Francisco, State of California."

Reasons for Proposed Modification:

Overseas Finance and Trading Co. is a limited partner and, therefore, its name should be added as one of the partners in the business of plaintiffs.

2.

Proposed Modification of Subparagraphs 1, 2, and 3 of Finding III:

"1. Said defendant appointed plaintiffs effective December 1, 1951, as the exclusive military service jobber for sales of defendant's products to all military stations, camps, posts, post exchanges and

other military installations in San Francisco, California, in the County of Alameda, State of California, and in Northern California.”

“2. Defendant appointed plaintiffs as said exclusive military service jobber for an unspecified period of time commencing on December 1, 1951.”

“3. Plaintiffs were entitled to the regular jobber’s price and were free to resell at any price fixed by plaintiffs.”

Reasons for Proposed Modification:

The plaintiffs were a jobber. They were not a “representative” because that term suggests the authority to bind the defendant as a principal. The whole transaction was one of outright sale from defendant to plaintiffs who then resold.

There was no “compensation” to plaintiffs. They purchased at the regular jobber’s discount and were free to resell on their own terms.

3.

Proposed Modification to Subparagraph 4 of Finding III:

“4. Plaintiffs agreed to promote the sale of defendant Hunt Food, Inc.’s food products to said establishments but there was no requirement that plaintiffs purchase any specified or minimum amount of goods.”

Reasons for Proposed Modification:

(a) The statement in plaintiffs’ proposed finding, that the plaintiffs agreed “to perform the

duties and obligations” of exclusive military service jobbers should be deleted. There is no evidence of what “the duties and obligations” of such a jobber are. There is no evidence that such duties and obligations—whatever they are—were ever discussed.

(b) The complaint (page 2, line 31) alleges only that plaintiffs agreed to promote the sale of defendant’s products.

(c) The evidence establishes that there was no quota or minimum amount that plaintiffs were required to purchase. This is a material fact, relative to the mutuality question and should be a part of the findings.

4.

Proposed Modification to Finding IV:

“The partnership of plaintiffs was first formed in April, 1951, and thereafter and until the making of the said oral agreement, plaintiffs’ business consisted of sales of food products to military establishments on a brokerage or on a bidding basis and said partnership had never theretofore acted as a military service jobber representative or agent in sales of food products. Prior to and at the time of making said oral agreement, plaintiffs informed representatives of Hunt Foods, Inc., a corporation, which representatives were not executive officers of that corporation, that in order fully to promote the sale of defendant’s products as military service jobber in Northern California, plaintiffs would for a year or two sell defendant’s products to said mili-

tary installations without substantial profit. Plaintiffs also informed said representatives that they might decrease their activity in their bidding and brokerage business theretofore conducted. Under said oral agreement plaintiffs were at all times free to continue to engage in said bidding or brokerage business or any other business for customers other than defendant Hunt Foods, Inc.”

Reasons for Proposed Modification:

(a) A fact material on the question of damages is that the jobber arrangement was a new type of venture for plaintiffs.

(b) The plaintiffs were free to and did engage in a tremendous volume of other business, a fact material on the issue of damages as well as on the issue of estoppel.

5.

Proposed Modification to Finding No. V:

“During the period from December 1, 1951, to the month of May, 1953, plaintiffs did not substantially abandon their activity in said former bidding business or in said former brokerage business. It is true that during the year 1952, plaintiffs’ brokerage business, for customers other than defendants, increased over the previous year by 30% and their bidding business amounted to 73% of the total business done by plaintiffs in said year. It is true that during the said period plaintiffs on occasions sold defendant’s products without substantial profit.”

Reasons for Proposed Modification:

Defendant is entitled to findings on the business done by plaintiffs for customers other than this defendant. These are material on the issues of damages and estoppel.

6.

Proposed Modification of Finding No. VI:

“No executive officer of defendant Hunt Foods, Inc., a corporation, knew any of the terms of the said oral agreement. The employee of said Hunt Foods with whom plaintiffs negotiated and made the said oral agreement had no written authority to enter into the said oral agreement. On April 25, 1953, defendant Hunt Foods, Inc., a corporation, terminated plaintiffs’ arrangement with said defendant and appointed another business firm to represent defendant as exclusive military services sales representative to sell defendant’s products to said military installations. At said time and for many months prior thereto, plaintiffs were indebted in large sums to defendant Hunt Foods, Inc., for merchandise purchased from defendant, which indebtedness plaintiffs were unable to pay when due, and plaintiffs had been for many months and were at the time of termination unable to comply with defendant’s demand for payment of sums due.”

Reasons for Proposed Modification:

(1) There is no proof that any executive officer of Hunts Foods, Inc., knew any of the terms of the

alleged agreement. This is material on the "Equal Dignities" Rule.

(2) The inability of plaintiffs to pay is material on the issue of damages. The failure to pay is material on the right to terminate, regardless of whether that was the reason given.

7.

Proposed Modification of Finding No. VII:

"At all times from the making of said oral agreement to, and including, the 25th day of April, 1953, plaintiffs were in default in the matter of their payments to defendant for merchandise purchased by plaintiffs from defendant. On April 25, 1953, plaintiffs were indebted to defendant in the sum of \$27,388.85, which indebtedness was in default and which plaintiffs were unable to pay or satisfy."

Reasons for Proposed Modification:

The evidence established that plaintiffs were in default almost from the beginning and that repeated requests for payment were made by defendant, but plaintiffs for one reason or another could not pay.

8.

Proposed Modification of Finding No. VIII.

"Plaintiffs' profits during the period December 1, 1951, to April 25, 1953, were not substantial."

Reasons for Proposed Modification:

Finding No. VIII, as suggested by plaintiffs, would find that plaintiffs' credit was damaged and

that this was due to its handling of defendant's products. There is no evidence that plaintiffs' credit was damaged (nor that they ever had credit) there is a complete lack of evidence that plaintiffs' financial condition was due to the handling of defendant's products. The evidence shows that plaintiffs, in that period, did a quarter of a million dollars of business in products of others than defendant and that they also conducted a substantial brokerage business. The evidence further established that plaintiffs have suffered a fire during the period which wasn't fully compensated by insurance and that plaintiffs had lent large sums of money to their limited partner.

9.

Proposed Modification of Finding No. IX:

“At no time did any executive officer of defendant Hunt Foods, Inc., approve or consent or have knowledge of any plans and intentions of plaintiffs, other than that plaintiffs purchased defendant's products and resold them to said military establishments.”

Reasons for Proposed Modification:

The evidence is clear that Phillips talked only to Mr. Flynn, a manager of a branch office, to Mr. Stieger, an assistant manager of a branch office, and to Mr. Miller, a sales manager, in making his arrangements. There was no evidence that any executive officer ever knew of an arrangement such as that claimed by the plaintiffs. All they knew

was that Hunt sold to Phillips who resold to military establishments.

10.

Proposed Modification of Finding No. X:

“As a result of the arrangement between plaintiffs and defendant, plaintiffs did not realize as much a profit during the period December 1, 1951, to April 25, 1953 as they might have made but for the said arrangement.”

Reasons for Proposed Modification:

(a) Plaintiffs did realize some profit.

(b) How they were damaged in the sum of \$21,500 does not appear in plaintiffs' proposed finding X.

11.

Proposed Modification of Finding No. XII:

“It is true that on or about July 14, 1953, plaintiffs accepted three trade acceptances numbered respectively 70452, 70453, and 70454, which said trade acceptances obligated plaintiffs to pay to defendant Hunt Foods, Inc., a corporation, respectively, the sum of \$4,439.79 on October 1, 1953, the sum of \$4,439.79 on November 1, 1953, and the sum of \$4,439.79 on December 1, 1953. Each of said trade acceptances entitles defendant to recover from plaintiffs all costs of collection including attorney fees which defendant incurs in the collection thereof. It is true that plaintiffs paid the defendant the sum of \$1,824.21 only on account of said

trade acceptance No. 70452 and that none of said trade acceptances were paid at maturity and it is true that the remaining unpaid balance due and owing from plaintiffs to said defendant upon said trade acceptances is the sum of \$11,495.16, with interest thereon in the sum of \$2,029.63. Defendant is entitled to recover from plaintiffs all costs incurred in connection with the action filed herein and to recover attorneys' fees in the sum of \$3,000.00."

Reasons for Proposed Modification:

(a) Hunt is entitled to interest on the liquidated amount, the plaintiffs' damages being an offset against the amount due, not a payment.

(b) The interest computation is:

Interest on \$2,615.55 from Oct. 1, 1953 to May 15, 1956:

a) Oct. 1, 1953, to Oct. 1, 1955....\$366.16

b) Oct. 1, 1955, to May 15, 1956

(227 days at .50)..... 113.50

\$479.66

Interest on \$4,439.79 from Nov. 1, 1953,

to Nov. 1, 1955.....\$621.56

Interest on \$4,439.79 from Nov. 1, 1955,

to May 15, 1956 (196 days at .85).....166.60

\$788.16

Interest on \$4,439.79 from Dec. 1, 1953,	
to Dec. 1, 1955.....	\$621.56
Interest on \$4,439.79 from Dec. 1, 1955,	
to May 15, 1956 (165 days at .85).....	140.25
	<hr/>
	\$761.81

Recapitulation

\$ 479.66

788.16

761.81

 \$2,029.63

(c) The amount of attorneys' fee is less than 25% of the judgment obtained.

12.

Proposed Modification of Finding No. XIII:

"A few days prior to November 1, 1954, defendant demanded payment by plaintiffs of the balance owed by plaintiffs to defendant for merchandise sold by defendant to plaintiffs during the period of the said arrangement. At said time, plaintiffs asserted they had a claim for damages for termination of the arrangement. On November 1, 1954, an account was stated by and between the parties under and by virtue of which it was determined that plaintiffs were indebted to defendant in the sum of \$11,495.16, no part of which has been paid."

Reasons for Proposed Modification:

This finding is pertinent to the issue of merger.

Conclusions of Law

Proposed Modification of Paragraph II of the Conclusions of Law:

“Defendant Hunt Foods, Inc., a corporation, is entitled to judgment against plaintiffs, and each of them, upon defendant’s Cross-complaint herein, in the sum of \$13,524.79, together with attorneys’ fees in the sum of \$3,000.00, and defendant’s cost of suit incurred herein.”

Dated: May 15, 1956.

Respectfully submitted,

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

/s/ VINCENT CULLINAN,

BEN C. DUNIWAY,

By /s/ VINCENT CULLINAN,
Attorneys for Defendant
Hunt Foods, Inc.

[Title of District Court and Cause.]

JUDGMENT

(Form Submitted by Defendant)

The above-entitled action came on regularly for trial on November 28, 1955, and was tried before the court sitting without a jury, Honorable Louis

E. Goodman presiding, on November 28, 29 and 30, and December 1, 1955; plaintiffs appearing by Wellington Phillips, and by their attorney, Harlow P. Rothert, Esq.; defendant Hunt Foods, Inc., a corporation, appearing by its attorneys, Vincent Cullinan, Esq., and Ben C. Duniway, Esq., and oral and written evidence having been adduced, the matter having been submitted upon briefs for the court's decision, and the court having made and entered herein its findings of fact and conclusions of law, It Is Hereby Ordered, Adjudged and Decreed as Follows:

1. Judgment is hereby granted to plaintiffs upon plaintiffs' complaint against defendant Hunt Foods, Inc., a corporation, in the sum of Twenty-one Thousand Five Hundred Dollars (\$21,500), together with plaintiffs' costs of suit incurred herein.

2. Defendant Hunt Foods, Inc., a corporation, is hereby granted judgment against plaintiffs, and each of them, upon said defendant's cross-complaint herein in the sum of Sixteen Thousand Five Hundred Twenty-four and 79/100 Dollars (\$16,524.79), together with defendant's costs of suit incurred herein.

Dated:, 1956.

.....,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 16, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 34288

WELLINGTON PHILLIPS and H. W. LIHOLM,

Plaintiffs,

vs.

HUNT FOODS, INC., a Corporation, JOHN DOE,
RICHARD ROE, XYZ Corporation, a Corporation, and BLACK & WHITE COMPANY,

Defendants.

JUDGMENT

The above-entitled action came on regularly for trial on November 28, 1955, and was tried before the court sitting without a jury, Honorable Louis E. Goodman presiding on November 28, 29, and 30, and December 1, 1955, plaintiffs appearing by Wellington Phillips and by their attorney, Harlow P. Rothert, Esq., defendant Hunt Foods, Inc., a corporation, appearing by its attorneys Vincent Cullinan, Esq., and Ben C. Duniway, Esq., and oral and written evidence having been adduced the matter having been submitted upon briefs for the court's decision and the court having made and entered herein its findings of fact and conclusions of law it is hereby ordered, adjudged and decreed as follows:

1. Judgment is hereby granted to plaintiffs upon plaintiffs' complaint against defendant Hunt Foods,

Inc., a corporation, in the sum of Twenty-One Thousand Five Hundred Dollars (\$21,500), together with plaintiffs' costs of suit incurred herein.

2. Defendant Hunt Foods, Inc., a corporation, is hereby granted judgment against plaintiffs, and each of them, upon said defendant's cross-complaint herein in the sume of Eleven Thousand Four Hundred Ninety Five and 16/100 Dollars (\$11,495.16).

Dated: June 7, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Disapproved as to form.

Dated: May 11, 1956.

CUSHING, CULLINAN, DUNI-
WAY & GORRILL,

/s/ VINCENT CULLINAN,
Attorneys for Defendant Hunt
Foods, Inc.

Lodged May 15, 1956.

[Endorsed]: Filed and entered June 7, 1956.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 7th day of June, 1956, against Defendants, the Clerk is requested to tax the following as costs:

Fees of the Clerk:

U. S. Dist. Ct., So. District, Los Angeles (filing fee for Miller deposition subpoena)		\$.75
Complaint Ala. Cty.	\$ 13.00	167.00	\$13.00*
			*Allowed
Jury fees	154.00

Fees of the Marshal:

Service of sub/take/dep., Miller..	10.00	13.50
Service of subpoena, Col. Bevins..	3.50

Fees for witnesses (itemized on reverse side)

10.00

Docket fees under 28 U.S.C. 1923....

20.00

Costs incident to taking of depositions: L. W. Phillips.....(copy)

45.27

Lee Miller

35.10

80.37

35.10*

Process: Service of summons and

complaint

5.00

.....

Total.....

\$296.62

\$142.62† Taxed.

\$ 97.35 Taxed.

*Figures and words in italics were written in green ink on original.

†Figures on original written in green ink and cancelled.

State of California,
County of San Francisco—ss.

I, Harlow P. Rothert, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Vincent Cullinan, Esq., 1 Montgomery St., San Francisco, with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 13th day of June, 1956, at 9:45 a.m.

HANCOCK, ELKINGTON &
ROTHERT,

/s/ HARLOW P. ROTHERT,
Attorney for Plaintiff.

Subscribed and sworn to before me this 12th day of June, A.D. 1956, at San Francisco.

[Seal] /s/ JESSIE R. CALDERWOOD,
Notary Public.

Costs are hereby taxed in the amount of \$97.35 this 14th day of June, 1956, and that amount included in the judgment.

/s/ C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 7th day of June, 1956, against Plaintiffs, the Clerk is requested to tax the following as costs:

Fees of the Clerk:

Petition for Removal	\$ 15.00		
----------------------------	----------------	--	--

Fees of the Court Reporter:

For all or any part of the transcript necessarily obtained for use in the case		<i>Disallowed*</i>	
	\$473.85		

Costs incident to taking the depositions:

Lee Miller(copy)	\$ 19.50		
W. Phillips	99.05	118.55†	\$99.05*

Filing Petition to Remove, Alameda

County	7.00
--------------	------	-------	-------

Serving Subpoena, W. J. Reid.....	6.00	13.00
-----------------------------------	------	-------	-------

Total.....		\$620.40	\$127.05*
------------	--	----------	-----------

On objections, entire bill disallowed.

May 14, 1956.

C. W. CALBREATH,

Clerk;

By /s/ MARGARET P. BLAIR,

Deputy.

*Words and figures in italics written in green ink on margin of original.

†Cancelled on original.

State of California,
City and County of San Francisco—ss.

I, Vincent Cullinan, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Harlow P. Rothert with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 14th day of June, 1956, at 10:00 a.m.

/s/ VINCENT CULLINAN,
Attorney for Defendant.

Subscribed and sworn to before me this 13th day of June, A.D. 1956, at San Francisco, California.

[Seal] /s/ MARION M. GORMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Oct. 18, 1956.

[Endorsed]: Filed June 14, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Court of Appeals:

Notice is hereby given that Hunt Foods, Inc., defendant and cross-complainant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 7, 1956, in which judgment was entered in favor of defendant and cross-complainant in the sum of \$11,495.16 and in which judgment was entered in favor of plaintiffs and cross-defendants in the sum of \$21,500. Said defendant and cross-complainant appeals from that part of the judgment in its favor as well as that part of the judgment in favor of plaintiffs and cross-defendants.

Dated: June 11, 1956.

/s/ VINCENT CULLINAN,

/s/ BEN. C. DUNIWAY,

CUSHING, CULLINAN,
DUNIWAY & GORRILL,

Attorneys for Defendant and Cross-Complainant,
Hunt Foods, Inc.

[Endorsed]: Filed June 18, 1956.

[Title of District Court and Cause.]

BOND

Whereas, the Defendant in the above-entitled action, Hunt Foods, Inc., a Corporation, has appealed to the United States Court of Appeals for the Ninth Circuit from a net judgment of Ten Thousand Four and 84/100ths (\$10,004.84) Dollars, and claimed costs of Two Hundred Seventy-six and No/100ths (\$276.00) Dollars, and made and entered against the Defendant in said action in the United States District Court for the Northern District of California, Southern Division, in favor of the Plaintiff on June 7, 1956;

Whereas, the Appellant is desirous of staying the execution of said judgment so appealed from,

Now, Therefore, in consideration of the premises and of such appeal the undersigned, The Fidelity and Casualty Company of New York, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the State of California, does hereby acknowledge itself justly bound in the sum of Twelve Thousand and No/100ths (\$12,000.00) Dollars.

That if Said Judgment Appealed From, or any part thereof, be affirmed or the appeal be dismissed

the Appellant will pay the amount directed to be paid by the judgment, or the part of said amount as to which the same shall be affirmed if affirmed only in part, and all damages and costs which shall or may be awarded against the appellant upon the appeal; and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the judgment in the court from which the appeal was taken, judgment may be awarded in the said action on motion of respondent, without notice to the undersigned Surety, in their favor against the Surety for such amount together with the interest that may be due thereon and the damages and costs which may be awarded against the Appellant upon the appeal.

In Witness Whereof the Said, The Fidelity and Casualty Company of New York, does cause this obligation to be signed by its duly authorized attorney and its corporate seal to be hereunto affixed at San Francisco, California, this 11th day of June, 1956.

Approved: June 13th, 1956.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Seal]

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

By /s/ LAUREL E. MAY,
Attorney.

State of California,
City and County of San Francisco—ss.

On this 12th day of June, in the year One Thousand Nine Hundred and Fifty-six, before me, C. J. Treganowen, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Laurel E. May, known to me to be the Attorney of The Fidelity and Casualty Company of New York, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ C. J. TREGANOWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 16, 1958.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

I.

Points upon which appellant relies in the appeal from the judgment of the District Court, awarding judgment in the sum of \$11,495.16 and which fails to include interest, costs and attorney fees.

1. The Cross-Complaint of appellant sets forth three trade acceptances, each of which was for a specified amount and each of which was in default on or before December 1, 1953. Each requires plaintiffs to pay all costs of collection including attorneys' fees. Each of these trade acceptances draws interest, under the law, from the respective maturity dates, to wit, October 1, 1953, November 1, 1953, December 1, 1953.

2. The District Court failed correctly to apply the law in refusing to award appellant interest on the definite amounts that became due, respectively, in October, November, and December, 1953. Unliquidated cross-claims of appellee does not render appellant's trade acceptances unliquidated, and the unliquidated claims of appellee are given treatment as discounts, not as payments made at the time the debt is due.

Cal. Lettuce Growers v. Union Sugar (1955)
45 Cal. (2d) 474, 487.

Lineman v. Schmid (1948) 32 Cal. (2d) 204.

3. The District Court erred in failing to award appellant reasonable attorneys' fees, as provided for in the trade acceptances.

Kirk v. Culley (1927) 202 Cal. 501 at 508.

4. The District Court erred in failing to award appellant its costs of suit in connection with the judgment in appellant's favor, the trade acceptances providing therefor.

5. The Judgment is erroneous in that it does not run against the Limited Partner in the plaintiff partnership.

II.

Points upon which appellant relies in the appeal from the Judgment of the District Court in favor of Plaintiffs.

1. This is an action on an oral contract under which plaintiff was authorized by a district manager of defendant to buy merchandise from defendant and resell it, at prices determined by plaintiffs, to certain specified commissary stores. This was a new type of operation for plaintiff. The plaintiff partnership (consisting of Phillips and Liholm general partners, and Overseas Finance & Trading Co., a limited partner) was formed in late 1950 and engaged in a "bidding business" i.e bidding on food items under government bids. These items are dif-

ferent than the items sold to commissary stores. They also did "brokerage" business which, too, was a substantially different business than selling to commissary stores.

The alleged contract was entered into by plaintiff Phillips and an employee of defendant, now dead. Phillips admits that he was not bound to purchase any minimum or specified amount of goods. Phillips admits that he was not required to cease his bidding or his brokerage business. In fact during the 16 months he was buying and selling Hunt products, he was doing substantial business for others than defendant: he increased his profits in the brokerage business by some 30% and he did over a quarter of a million dollars in his bidding business.

No executive officer of Hunt Foods, Inc., had any knowledge nor any reason to suspect that plaintiffs were operating under a contract such as that asserted in this action.

The evidence shows that plaintiffs never had financial resources sufficient to enable them to buy and sell Hunt merchandise. Defendant never agreed to finance plaintiffs. Hence plaintiffs' inability to perform is clearly established.

There is no basis in the record for any award of prospective damages. The burden of proof is on plaintiffs. Plaintiffs operated for 16 months and had the exclusive for 21 commissaries. His proof consisted only of the volume done for 12 months at one commissary, 4 months at a second commissary and

4 months at a third. He made no effort to show his actual volume at these three commissaries for the full 16 months; he made no effort to show any of his volume at the other 18 commissaries. He used carefully selected fragmentary evidence of sales for limited periods at 3 commissaries as a basis for an inference as to what he did at these for the full period and as an inference of what he did at the other 18 commissaries. On the basis of these guesses, he speculates on what he might have done in the future.

2. The District Court failed correctly to apply the law in that it did not find that the arrangement between the parties was terminable at the will of either.

E. I. Du Pont DeNamour v. Clairborne Reno
(CC8th 1933) 64 Fed. (2d) 224.

Ruinello v. Murray (1951) 36 Cal. (2d) 687.

Curtis Candy Co. v. Silberman (CC 6th
1930). 45 Fed. (2d) 451.

Ford Motor Co. v. Kirkmeyer (CC 4th
1933) 65 Fed. (2d) 1001.

3. The District Court failed correctly to apply the law in that it did not find that the alleged contract, if it was to last for more than one year, was invalid under the Statute of Frauds.

Jurschik v. Farmers & Merchants Bank
(1951) 107 Cal. App. (2d) 405.

Smith v. Smith (1954) 126 Cal. App. (2d) 194.

4. The District Court failed correctly to apply the law (known as the "Equal Dignities Rule") or to find the fact that no executive officer of appellant was aware of any alleged contract which was to last for more than one year. The court ignored this fatal failure of proof on the part of plaintiffs and made no finding on this matter, although the evidence shows without contradiction that no executive officer was aware of the contract claimed by plaintiffs and found by the Court.

California Civil Code 2309 and 1624.

Ekwood Lumber Co. v. Moore Well Lumber Co. (CC 9th 1938) 97 Fed. (2d) 402.

Anderson v. Standard Lumber Co. (1923) 64 Cal. App. 410.

5. The District Court failed correctly to apply the law requiring Mutuality in a contract wherein the plaintiffs are not obligated to purchase any goods of a defendant and in which the plaintiffs are not required to cease other business.

Scott v. Cline Elec. Co. (1930) 104 Cal. App. 122.

Leach v. Kentucky Coal Co., 256 Fed. 686.

E. I. Du Pont de Nemours v. Clairbourne-Reno Co. (8th CC 1933) 64 Fed. (2d) 224 at 232.

Lawrence Block Co., v. Palston (1954) 123
Cal. App. 2d) 300.

6. The District Court failed correctly to apply the law in that it held that plaintiffs could recover damages where the proof is conclusive that plaintiffs were unable to perform.

McDorman v. Moody (1942) 50 Cal. App.
(2d) 136.

7. The District Court failed correctly to apply the law in allowing prospective damages for loss of expected profits where the evidence shows plaintiffs' business was a new and unestablished venture.

Calif. Press Mfg. Co. v. Stafford Packing
(1923) 192 Cal. 479.

25 C. J. S. 519.

Hartley v. Weller (1951) 104 Cal. App. (2d)
118.

8. The District Court is in error in awarding prospective damages when plaintiffs failed to adduce the best available proof of profits and relied on guesswork rather than actual facts known to and in the possession of plaintiffs.

Schmitt v. Continental-Diamond Fibre Co.
(CC 7th 1940) 116 F. (2d) 779.

Stephany v. Hunt Bros. (1923) 62 Cal. App.
638.

Allen v. Gardner (1954) 126 Cal. App. (2d)
335 at 342.

Austin v. Roberts (1933) 130 Cal. App. 328
at 333.

9. The District Court is in error in awarding damages when plaintiffs failed to offer evidence of expense of doing business.

Skupen v. Imperial Irrig. Dist. (1939) 33
Cal. App. (2d) 392.

15 Amer. Juris. page 574.

Ellerson v. Grove (CC 4th 1930) 44 Fed.
(2d) 493 at 499.

Central Coal & Coke Co. v. Hartman (CC
8th) 111 Fed. 96.

Alexander Dept. Stores v. Ohrbachs (1945)
56 N. Y. S. (2d) 173 at 182.

III.

Additional Points upon which Appellant relies in the appeal from the Judgment of the District Court in favor of Appellee and from the Judgment in favor of Appellant.

The Findings of the District Court are erroneous in that:

(a) Finding I fails to find that there was a limited partner in the partnership.

(b) Finding III is in error in finding anything other than that plaintiffs were jobbers. There is no evidence that plaintiffs were "representatives or agents." There is no evidence that plaintiffs were

to receive any "compensation." Without contradiction, the evidence shows that plaintiffs were authorized to buy products from defendant and resell at any price they choose and that this was the whole arrangement between them.

(c) The findings are silent on a material issue, i.e. the absence of any duty on plaintiffs to purchase any specified or minimum amount of goods. This is a material fact, relevant to the question of mutuality. The pleadings and proof are only that plaintiffs would "promote the sales" of defendant's products. Finding III, that plaintiffs agreed to perform the duties and obligations of exclusive military service jobbers, is clearly erroneous—there is no evidence of what such duties and obligations are and no evidence that such duties and obligations were ever discussed.

(d) There is no finding that the type of business undertaken by plaintiffs for defendant was a new business for plaintiffs. This is material on the issue of loss of future profits.

(e) There is no finding that plaintiffs were at all times free to and did engage in other business. This is material on the issue of damages, and on issue of mutuality and on the issue of estoppel to plead the Statute of Frauds.

(f) Finding V omits to find that plaintiffs' brokerage business increased and that his bidding business for others was substantial during the period they were Hunt's jobber. The evidence does

not show that plaintiffs actually reduced their bidding business as a result of the work on Hunt products.

(g) The findings fail to state that no executive officer knew of any of the terms of an agreement such as found by the trial court. Without such a finding, the defendant cannot be bound by such a contract. The evidence shows no executive officer had any knowledge of such a contract as that found by the court.

(h) The findings (VI and VII) fail to state that plaintiffs were in default, unable to pay, and would be unable to continue to purchase Hunt products for lack of funds and that lack of funds was not caused by defendant.

(i) There is no evidence to support any finding (VIII) that plaintiffs' business credit was damaged, nor any evidence that plaintiffs ever had business credit.

(j) The finding (IX) that defendant approved and consented to plaintiffs' plans is without any support in the evidence. The evidence shows, without contradiction, that no officer of Hunts ever knew of any arrangement such as that claimed by plaintiffs.

(k) There is no finding of what was a "reasonable period of time" mentioned in finding X.

(l) Finding XII completely omits any reference to interest due on the trade acceptances and to the provision therein for attorney fees.

(m) The Findings of Fact, set forth by the District Court are clearly erroneous because they are against the clear weight of the evidence.

(n) The District Court erred in not finding the facts set forth in Defendant's Proposed Modification to Findings of Fact.

(o) The District Court erred in that its decision herein is contrary to the applicable decisions of the Courts of Appeal of the United States, and the decisions of the Courts of the State of California.

Dated: June 26, 1956.

/s/ VINCENT CULLINAN,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 27, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 34,288

WELLINGTON PHILLIPS and H. W. LIHOLM,

Plaintiffs,

vs.

HUNT FOODS, INC.,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

November 28, 1955

Appearances:

For the Plaintiff:

Messrs. HANCOCK, ELKINGTON &
ROTHERT, by
HARLOW P. ROTHERT, ESQ.,

For the Defendant:

Messrs. CUSHING, CULLINAN,
DUNIWAY & GORRILL, by
VINCENT CULLINAN, ESQ.

* * *

The Clerk: Phillips, et al., vs. Hunt Foods, for jury trial.

Mr. Rothert: Ready.

Mr. Cullinan: That is ready.

The Court: Call the roll of the jurors.

Mr. Rothert: If your Honor please, I represent the plaintiffs and have conferred with the attorney for the defendant, and we are willing at this stage to waive the jury and let the matter be decided by your Honor as a trial without a jury. I understand that Mr. Cullinan, representing the defendant, doesn't wish to ask for a jury if we waive it.

Mr. Cullinan: We did not request the jury in the first place. I think it is a case that should be tried by the Court without a jury.

The Court: You wish to waive the jury?

Mr. Rothert: Yes, your Honor.

The Court: Of course, you will have to pay the jury fees for today because we summoned the jury

especially for this case, because there is no need for a jury otherwise.

Mr. Rothert: I understand that. We felt that it would be a saving to the government to waive the jury if we are willing to have the matter heard as a court trial by your Honor instead of having the jury attend for several days.

The Court: Well——

Mr. Rothert: Although the waiver comes late. In other [3*] words, we felt that it was better late than never if we were going to waive the jury.

The Court: Perhaps that is right. It doesn't make any difference to me whether the case goes before the Court or a jury; but we did summon this jury especially for this case and we have no other place to use them. There is another panel summoned for another judge. If the Court had been notified in time for the Clerk to send out notices—in fact, even if we had been notified in time to telephone the jurors as we sometimes do, it would have saved that expense.

Mr. Rothert: The parties don't know until the morning the case is supposed to start, in which departments it might be assigned; and we didn't feel we were in a position to waive the jury until this morning, your Honor.

The Court: Well, we will have to adjust that matter later, but the cost of this panel will have to be assessed. We will leave the decision as to how that is to be done until later in the case.

Mr. Rothert: Yes, your Honor.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Call the roll of the jurors so we can see who is here.

(The clerk, thereupon, called the roll of the jury and announced that 22 jurors were present.)

The Court: Members of the jury panel, your services are not going to be needed in this courtroom; but it may be [4] possible that a criminal case that is proceeding before Judge Harris—in a criminal case before Judge Harris, some of you may be needed, so I will ask you to remain here in this courtroom for a short time and we will let you know. In the meantime, you can amuse yourselves by listening to the proceedings that are going on here, and whatever jurors are needed in the other department will be credited to the account, as it were.

Mr. Rothert: Yes, your Honor.

The Court: Proceed.

The Clerk: Will respective counsel please state their appearances for the record?

Mr. Rothert: Mr. Harlow P. Rothert of the firm of Hancock, Elkington & Rothert, appearing for the plaintiffs.

Mr. Cullinan: I am Vincent Cullinan of the firm of Cushing, Cullinan, Duniway & Gorrill, appearing as attorney for the defendant, Hunt Foods.

Opening Statement on Behalf of Plaintiffs

Mr. Rothert: Your Honor, this is a case involving the breach of an oral contract and seeking damages for that breach. I think some of the facts are so unusual that it may assist the Court if I make

a rather detailed statement of what we intend to prove on the part of the plaintiffs in this case.

I believe the evidence will show that Mr. Phillips, one of the two plaintiffs who are partners in a firm called L. Wellington Phillips Company, was all his life in the grocery [5] and food business; that he worked for many years for Safeway Stores in various capacities—as a salesman, in the warehouse operations, buyer, and as a man in charge of several of Safeway Store's large super-markets; also he was employed by Libby, McNeill & Libby in the food business for several years.

Shortly after World War II, he was associated for a time with John Rothschild Company, which is a jobbing and brokerage firm specializing in sales to the military forces, primarily on the basis of bidding to the government for sale to the army, navy, Marine Corps and other branches of the service. And in that connection, Mr. Phillips acquired experience and knowledge concerning the military buying of items including food products.

In 1950, Mr. Phillips and Mr. Liholm started the plaintiff partnership and started up a business essentially in the bidding for government food purchase contracts, and were in that business for about a year prior to the making of the oral contract involved in this case.

In that year's business or year's business they had earned a profit and later reports indicated that for the year 1951 they earned about \$15,000 profit in their first year's business in the bidding for government purchase contracts essentially in food items.

In August and September of 1951 the evidence will show that a Mr. Flynn, who was manager of the district sales for [6] Hunt Foods, Inc., in Northern California, contacted Mr. Phillips and asked him to come over and talk to him about possibly handling the sales of Hunt Food lines through the commissary stores and military bases in Northern California.

Without going into details of the alleged conversations and agreement, I will state that we believe the evidence will prove that in the subsequent discussions between Mr. Phillips and Mr. Flynn of the Hunt Foods Company, the local district manager, and with Mr. Miller, who was the division manager, sort of like a sales manager for the entire United States with headquarters in Fullerton, California, the home offices—in those discussions, an oral agreement was reached in which Hunt Brothers authorized the plaintiffs to act as the exclusive jobber for the sales of Hunt Food Products to the military bases and commissary stores in Northern California, and in the agreement, Mr. Phillips agreed that he would not represent any other competing lines in the sales to these stores and at the military bases; that he would promote and diligently further the sales of Hunt Lines in these stores; and that he would be so authorized for a period of at least ten years.

The evidence will show that Mr. Phillips advised the defendant that in order to take on this assignment he would have to abandon, or substantially

abandon, his bidding business, which had been profitable and was growing, because he couldn't [7] have the time himself to promote the sales of Hunt Foods and also maintain the bidding business.

Also, the evidence will show that he advised Hunt Foods, and Hunt Foods well knew, that for a period of time, which Mr. Phillips estimated and stated would be approximately two years, he would have to handle the sale of Hunt Food Products without a profit and possibly at a loss in order to promote the sales of Hunt Food products to these military bases.

The evidence will show that one of the reasons for that situation was that the salesman for Hunt Foods, Inc., had previously been selling their products direct to these commissary stores and had established a price list with them and that the prices at which Hunt Foods was going to sell its products to Phillips which in turn would be resold to the commissary stores was substantially the same price that the commissary stores had previously been paying for the Hunt products; that Mr. Phillips informed them that there would be a period of time before he could create for himself a profit margin on the resale of Hunt items to these commissary stores.

The evidence will show that at that time and basically at nearly all times the Hunt Foods line is priced below the price of its competitors, but that there is a margin of difference in the price which would permit an increase in the price of Hunt products to the commissary stores and still stay underneath

or not in excess of the price of the competing [8] lines.

The evidence will show that in the arrangement the Hunt Foods salesman would receive credit for all sales made by Mr. Phillips' partnership to these commissary stores; that the salesman for Hunt Foods would be relieved of the necessity of making those calls and could concentrate on other business of the grocery stores, super-markets and other business.

The evidence will show that Mr. Phillips advised Mr. Flynn and Mr. Miller of Hunt Foods that in view of the fact that it would be a losing proposition for him for about two years and that when he succeeded in increasing the volume and creating a profitable margin for himself, it would take him two or three more years after that to make up for the initial period without profit and that he wouldn't want to give up his existing profitable business unless he could be assured that he would have the authorization and the line for ten years, and that he was advised by defendant's representatives that he could count on having this agreement for a ten year period, or even longer if he succeeded in successfully carrying out the arrangement.

The evidence will show that Mr. Phillips entered into the promotion of these sales and the buying of Hunt products for resale to the commissary stores about the first of December, 1951. At that time the Hunt Foods Company issued a written memorandum which they distributed to the commissary [9] stores advising them that L. W. Phillips Company

was the exclusive military jobber on sales to the commissary stores on military bases in this area.

The evidence will show that during the period of about fourteen or fifteen or sixteen months Mr. Phillips was allowed to carry out this program, the volume of sales of Hunt Food products to the military stores and bases substantially increased; that he was able to develop a profit margin from about one per cent to about nine per cent on the average in that period of time; that he succeeded in getting numerous Hunt canned food items into the commissary stores where they had not been placed before; that he had just gotten to the point where two of the large military bases had decided to let the entire Hunt Food line come into the store and be sold there where they had not been sold before; that the assistant sales manager for this district, a Mr. Steiger, had made a trip with Mr. Phillips in April of 1953 to see what was going on and wrote letters indicating their entire satisfaction with the performance, improvements and business being done by the plaintiffs on the resale of these Hunt items.

The evidence will show that during that period of time plaintiffs did abandon, substantially abandon their bidding business, so that at the time of the termination of this arrangement the amount of bidding for government contracts that they had was down to 20 per cent of the amount that [10] they had had before the Hunt line was taken on.

There will be evidence here, your Honor, explaining the difference here between the bidding business and the matter of selling to the commissary stores

and military bases. A person bidding for government military purchases places a bid at a certain place with the government purchasing office, and if that bid is accepted he has a contract. He has to have definite commitments and either own the products that he has made a bid on or have credit sufficient to have definite commitments so that he is in a position to supply the products if the bid is accepted.

The evidence will show that these bids must be acted upon quickly; that only a person with the type of experience that Mr. Phillips had who knows the sources of supplies of various food items and the pricing and all that can successfully carry on a bidding business, and that it was impossible for Mr. Phillips to diligently promote the sale of Hunt lines under this arrangement and also pay attention to the bidding business.

The evidence will show that at the time in late April, 1953, Mr. Phillips was notified by Mr. Steiger, the assistant sales manager for Hunt Foods in this district, that Mr. Phillips could no longer sell the Hunt lines to the commissary stores.

The evidence will show that prior to that Mr. Phillips [11] had run into rumors that there was going to be a change and that these rumors in the industry had caused him to lose a certain amount of business that he otherwise would have received in the early part of 1953, the business of selling Hunt Foods to these military stores.

The evidence will show that this termination of the arrangement with Mr. Phillips was the result of

an agreement that Hunt Food Products made with a nation-wide concern named Francois L. Schwarz & Company to handle the sales of all Hunt Food products to all the military bases and commissary stores in the United States and possibly on an international scale.

The evidence will show that the arrangement that Hunt Foods had with Phillips in this particular district was unique and there was no other similar arrangement that Hunt Foods had in other areas of the country.

I believe the evidence will show that the reason why Phillips had to go was that the company had made a larger and different arrangement with a nation-wide concern which conflicted with the arrangement that had been made with Phillips.

The evidence will show that following the termination, in April, 1953, Phillips attempted to return to the bidding business; that he was unsuccessful, was unable to earn a profit, and that he lost money for the year 1953; that he did not have any credit with which to borrow funds to finance the [12] bidding business; that he did not have any capital because of the expensive promotion for a year and a half of Hunt sales without profits, and actually at a loss because of the expense of promoting a line, and that he was unable to successfully renew his bidding business and has been strapped in his business because of his financial problems and loss of money.

On the issue of damages we will prove in view of the progress made by Mr. Phillips during the year

and a half that he was allowed to work in the performance of this contract, the profit margin that he had been able to create in the sale of these items, the increase in volume, that he could have earned in the subsequent years a net income of \$10,000 a year in the very next year, and in the next two years following, the third year, 30 to 35 thousand dollars net, and in the last five years of the ten-year period, a substantial sum in excess of that \$35,000, which I have stated were the estimated profits of the third, fourth and fifth years of the ten-year period.

It is plaintiffs' position that although this is an oral contract which cannot be performed with one year and which would appear on its face to be subject to the statute of frauds, that the promises of the defendant relied upon by the plaintiff resulted in the plaintiff changing his position and abandoning his former profitable business and the impairment of his capital and the damaging of his credit to the point [13] where the defendant is estopped to defend against the breach of contract on the ground of the statute of fraud. That point was argued and briefed and decided by Judge Harris on a motion to dismiss.

For your Honor's information, also, the defendant has cross-complained in this case for a sum of money which plaintiff owed to the defendant for canned goods items purchased and not paid for, and in our answer to that cross-complaint we have admitted that the amounts are unpaid for, and there is no issue that they represent products purchased by the plaintiff, which have never been paid for to date.

The evidence will show that at the time of the termination the plaintiffs were unable to pay for those products and remain in business at all, and were faced with the choice of either quitting business altogether and using what assets they had for the discharge of their debts or in letting the Hunt account extend for a period of time in the hope that they could recover from this termination and eventually pay them off in full.

The evidence will also show that following the termination in the succeeding few months, representatives of Hunt Foods told Mr. Phillips that there was a good chance that he could get this arrangement back, but that getting it back never materialized.

The questions of the margin of profit on the resale of [14] Hunt lines and why there was opportunity to purchase and resell the Hunt products at a profit are somewhat technical, based on peculiar pricing and other factors in the canned food business which will be brought out by the testimony. I think it would probably be confusing to go into that part of it in detail in an opening statement.

Opening Statement on Behalf of Defendant

Mr. Cullinan: If your Honor please, the evidence will show that in 1951, Mr. Phillips came to Hunt Foods asking if they would take him on as a broker. They told him they wouldn't do so.

The evidence will show that then in the fall of 1951, the parties agreed to the ordinary jobber type of arrangement, nothing said about ten years, noth-

ing said about irrevocable contract. It was the ordinary kind of jobber arrangement wherein either party could terminate at any time. He was just a customer of Hunt Foods in the Northern California area buying our products and reselling them to government commissaries.

At the time he agreed that he would pay for all purchases on a ten day, two per cent discount; he was to pay us ten days after he was invoiced.

The evidence will show that for the first month, about the month of December of '51, he so paid; at ten days from billing, he paid us. We gave him a limited line of credit of \$2,000, but he gradually, from January of '52 on, started to [15] ignore that ten day payment basis until, as a matter of fact, at the time of the termination, as the evidence will show, he was more than four months behind in his payments to Hunt Foods.

In May of 1952, the evidence will show that his indebtedness had mounted up considerably and that, as a protection for us, he assigned to us certain accounts; that under the assignment the monies collected on these accounts were to be held by him as trustee for us and paid to us, and the evidence will show that he didn't do that.

In April, 1953, we decided, as we had a right to do, to terminate this arrangement with Mr. Phillips. He then owed us about \$25,000.

Phillips did not at the time of termination claim that he had any contract with Hunt Foods Company. In fact, his first claim of a contract with us was made about a year later subsequent to the death of

Mr. Flynn, with whom he claims to have made the contract. And between the termination in April, 1953, and the early part of 1954, there are innumerable letters which will be introduced in evidence, between the parties, and in none of these letters did Mr. Phillips claim that he had a contract; in virtually all of these letters he is explaining how he hopes to pay us off; that we won't lose a dime; or explaining why he wasn't able to keep promises made in preceding letters. But in none of those did he claim any [16] contract. And after the termination he consistently and readily admitted his indebtedness to us and thanked us for our leniency in not pressing him too hard.

The termination was in the latter part of April of '53. In July of '53, in order to help him out——

The Court: That is not quite clear to me, Mr. Cullinan. What do you mean by "termination"?

Mr. Cullinan: Well, we told him that we were no longer going to sell to him; he was no longer going to be our jobber to sell to military bases; we had somebody else.

The Court: Was there an issue as to whether or not there was an oral agreement by which Hunt Foods was to market through Phillips, or were to sell through Phillips, or were to sell to Phillips exclusively for resale to the military?

Mr. Cullinan: No; there is no issue on that. There is no issue to the fact that we said to Phillips, "You can be our exclusive jobber to sell these military establishments." But as far as the ten years, that we couldn't terminate it or he couldn't termi-

nate it; no such oral agreement is involved, according to the evidence that we will show. The plaintiff, of course, claims that he had a ten-year oral contract.

The jobber arrangement was terminated in April of 1953. He then owed some \$25,000. In July of 1953 the balance was down to \$22,198.95. Then we had him give us five trade acceptances, payable at stated times. The first two were actually [17] paid off. The last three were due, respectively, October 1st, 1953, November 1st, 1953 and December 1st, 1953. Each of these is in the sum of \$4,434.79. On the trade acceptance due October 1st, 1953, he paid some part of it. There is still \$2,615.55 left on that trade acceptance. And on the other two, due respectively November 1st, '53, and December 1st, '53, nothing has been paid on those trade acceptances. They are pleaded in the cross-complaint and admitted in the answer.

So the evidence here, briefly, will show that the whole idea of a contract developed in the plaintiff's mind after our numerous attempts to work out the payment of his indebtedness to us. We told him that we were going to place it in the hands of an attorney, and that was more than a year after the termination, and that was the first time that he claimed he had any kind of a contract. The first claim was that he had a written contract, and he was asked to produce the contract, as the evidence will show, and he failed, of course, to produce any contract; and that in many of the discussions when he first claimed the contract, the credit manager of

Hunt's, the evidence will show, said, "Let us scotch this matter of a contract; come and tell us what is the contract." And thereafter the correspondence of Mr. Phillips has nothing to say about the contract but only about how he is going to liquidate the indebtedness to us. And we submit that the evidence will not show any basis for an estoppel to plead the [18] statute of fraud in this case.

The Court: Is there any issue, so far as you are concerned, as to any period of time for which this arrangement was to continue?

Mr. Cullinan: Well, yes, your Honor; we say that that arrangement could have been terminated the next day or the next month or at any time by either party, and that is the usual jobber arrangement, and that is what we had with Mr. Phillips.

The Court: What was the advantage to Hunt Bros. to have him act exclusively in the sale of its products to the military?

Mr. Cullinan: The only advantage to Hunt's was that if you have a man to whom you are selling, he is a customer, he is going to resell to the government commissaries, resell your products to the government commissaries—your salesmen don't have to call on the government commissaries and make them work another client.

The Court: That is an advantage?

Mr. Cullinan: That is the only advantage, as we see it.

The Court: The only advantage? [19]

Mr. Cullinan: Whether the evidence will show it was an advantage to us or not—well, the evidence

will show whether it was or was not, but that would be the only reason for appointing a jobber to handle the distribution. His distribution was limited to certain specified commissaries in Northern California.

The Court: You say that you terminated this arrangement because it was terminable at all or because of a breach on the part of the plaintiff in failing to pay?

Mr. Cullinan: We say this, your Honor: We say, first, we have the right to terminate this at any time. Number two, assuming that he could establish that there was such a contract—I am assuming; I do not say that I believe there is the faintest possibility he could—but assuming something, he obviously breached the contracts in not making the payments he was to make. In fact, he did not make the payments he was to make under our arrangement.

The Court: Was the termination of your contract done in writing?

Mr. Cullinan: No.

The Court: Or was that oral, too?

Mr. Cullinan: That was oral, too, but two of our men met with them and said, "We are no longer going to sell to you. We are going to sell to someone else."

The Court: Do you want to go ahead with your evidence? [20]

Mr. Rothert: Yes, your Honor, Mr. Phillips.

L. W. PHILLIPS

called as a witness on behalf of the plaintiffs;
sworn.

Q. (By the Clerk): Will you please state your
name to the Court? A. L. W. Phillips.

Direct Examination

By Mr. Rothert:

Q. Where do you live, Mr. Phillips?

A. 503 MacArthur Drive in Colma.

Q. What is your business at this time?

A. Food business, wholesale food business and
brokerage.

Q. Are you at the present time in any firm or
in business for yourself?

A. L. W. Phillips Company, the same as before.

Q. What type of organization is L. W. Phillips
Company? A. They are a food——

Q. I mean, is it a corporation, a partnership——

A. Partnership.

Q. Who are the partners in that company?

A. Mr. Lee Holm and oversees finance and trad-
ing as a limited partner.

Q. Was that partnership in existence in the
year 1951? A. Yes, sir.

Q. Has it been in existence at all times since
1951. A. That is right. [21]

Q. I will show you a copy of affidavit of publi-
cation——

The Court: Is there any need to go into that,
Counsel?

Mr. Cullinan: No, your Honor. We stipulate

(Testimony of L. W. Phillips.)

that the partnership was formed on whatever date the document bears.

Mr. Rothert: The publication in the Recorder was on September 24th, 1951. The notary's certificate on the certificate of partnership is dated April 12th, 1951.

Mr. Cullinan: We will stipulate to that. There is no issue as to the partnership formation.

Q. (By Mr. Rothert): Will you state for the Court, Mr. Phillips, what your business background is, what lines of business you have been in, and what experience you have had?

A. I have been in the food business all of my life since 1928, I believe, or 1925. I went to work for a wholesale grocery house in San Diego, and went from there to Libby, McNeill & Libby as a salesman about 1926 and remained with Libby as a salesman and later district manager until 1935, and in 1935 I was employed by Western States Wholesale Grocery Company, which was a subsidiary of Safeway Stores, as a salesman in Fresno.

Q. Excuse me, Mr. Phillips. Before you go on, you say you were district manager for Libby, McNeill & Libby for a while?

A. Southern California, San Diego.

Q. Is that manager of sales?

A. Yes, sir, with seven salesmen, and then in 1938 I was made [22] warehouse manager in San Jose, and in the same year I was transferred to Eureka as a warehouse manager and buyer and sales manager. In 1941 I was made a zone retail operations manager of Safeway Stores.

(Testimony of L. W. Phillips.)

Q. In what zone?

A. In Northern California zone, and in charge of buying, selling and promoting of food items in super markets.

In the interim year there in 1939 I was in the analytical department of Safeway Stores, inventory control, and so forth, in Oakland. In 1948 I left Safeway Stores and went to work as sales manager due to the fact that they closed the zone in Northern California. I went to work as sales manager of Lang & Strowe Company here, a food brokerage house. In the last of 1948, I believe it was, I went to work as buyer and manager of John Rothchild and Company, an exclusive military bidding job, and in 1950, about September, we actively started the same kind of concern at 915 Bryant Street.

Q. When you say the same type of concern, you mean selling material on bidding?

A. Government bidding, that is right.

Q. Were you familiar with the Hunt Food Products line prior to the arrangement that you had with Hunts in 1951?

A. Yes, sir, I had known Hunt's line and bought it for Safeway Stores and Western States Wholesale Grocery Company from its instigation. I believe Hunt first came on the market [23] about 1945 or 1946. The Hunt personnel that we knew here in the case of Mr. Flynn and some of the other personnel I believe were—I knew him part of that time, of course, with the CHB Company, whom

(Testimony of L. W. Phillips.)

Hunt bought out, a pickle concern. Mr. Flynn was the salesman or sales manager of some type during those years, and we used to buy CHB pickles from him. I knew Mr. Flynn for——

Q. I just asked you about the type of business of the L. W. Phillips Company.

A. You mean did we buy Hunt's products?

Q. No, you have answered the question. When did you first have any contact with a representative of Hunt Foods about the subject of your selling the Hunt line to the commissary stores?

A. We had the first contact with Hunt Foods about the commissary stores in August, some time in early August, if I remember.

Q. Of what year? A. 1951.

Q. What results had you had up to that time in your bidding business of the partnership?

A. Our bidding business started actively in October of 1950, I would say the 1st of October, and for the months of October, November and December, 1950, our net was \$1,950, and rather successful, the first three months in operation. And then up [24] to the time that we talked to Hunt or they talked to us in 1951 our bidding business had increased, I think our records will show, about 200 per cent over our first quarter of 1951, and our profits, of which we kept a running record, were substantial to the point where we figured by August or September, 1951——

Mr. Cullinan: Just a minute. If your Honor please, as to what he figured or guessed, I submit

(Testimony of L. W. Phillips.)

that that is pure hearsay, that the books would be the best evidence of whatever the profit was up to this point.

The Court: I will sustain the objection.

Q. (By Mr. Rothert): For the year 1951, what was the result of the partnership's business as far as profit or loss was concerned?

A. For the year 1951?

Q. Yes.

A. The year 1951 showed a net of approximately \$15,000, besides the \$5,000 that I drew, which would be about \$20,000 net past expenses.

Q. This bidding business that you refer to, will you explain to the Court what type of operation the bidding business is?

A. The bidding business is the bidding on food items and similar items in the food field, the grocery field, which items are to be used by the troops or by the soldiers and the sailors as subsistence. You bid on that according to specification [25] and not according to brand. They ask for a thousand cases of tomatoes and ask for a certain kind and you bid that price against all other bidders, of which there are many.

Q. You say ask for tomatoes of a certain kind. What do you mean by tomatoes of a certain kind?

A. Certain type. They would ask for a choice tomato, fancy tomato, or tomato puree. They would not ask for a brand, and that bidding would cover the entire food field which would, of course, include everything in the food store, everything that was

(Testimony of L. W. Phillips.)

used including soups and shortenings of every type that could be used.

Q. Were the items purchased by the government on the bidding business the same or different than the items sold to the commissary stores?

A. They would be different items. The commissary store items are bought for resale, and at certain times some resale items are used in emergency by the troops. That has been done. But the regulation states that no one can specify a brand of merchandise to be bought with subsistence money. It has to be specified by specification. You can't ask for any brand if you are going to expend it without a return of money.

Q. When you say subsistence, do you mean that the military troops keep——

A. That is right, they eat that without return of money. I might explain the financial set-up of the government as a [26] matter of information. There are two sets of money, you might say. One money is allocated by Congress for the benefit of feeding of the troops and subsistence. Another bunch of money is loaned to the commissary stores to buy merchandise and resell to the personnel, and that money is returnable.

Q. What did you do in your business, the bidding business? What would you have to do and what did you do to make a bid on a government purchase?

A. Well, it is quite an intricate affair. One thing

(Testimony of L. W. Phillips.)

you must know in the food business if you are going to bid on—we will take an item of tomatoes. We were just talking about that. Suppose that the Navy asks for a thousand cases, and they generally ask for it in pounds, which is more confusing than ever—they would say, “We want so many pounds of an item”—you would have to know the specification. If they asked for Type 2, and so on, that would mean a certain type, a standard grade—that would mean a standard grade of tomatoes approved by the Department of Agriculture. You would have to know what packer had that type of tomato. You would have to know whether that type of tomato would pass the federal inspections, which is handled here in San Francisco. You would have to know what price the last bid was. You would have to know if you could get delivery. And you have to know your cost of packing or special marking or anything that would apply to that particular item. You would have to also [27] control that item, either by money or an option with a credit line back of it, or have it in your warehouse ready for delivery and, as a rule, those items were asked for and you would have to answer those bids you are working on within a period of 72 hours or less, and delivery would have to be made probably within two or three weeks and completed.

Q. Were these bids always on just one item to be purchased?

A. No, these bids covered hundreds of items, anything that you could find that anyone would

(Testimony of L. W. Phillips.)

need in a restaurant as a food item, that bid would cover that item—anything that is eaten at the table or used around as soap, shortenings, and so forth.

Q. How did you ascertain the source of products upon which you would bid and the price and delivery specifications and other factors involved?

A. We will take tomatoes again as an example, since we have been talking about that. There are about 28 tomato packers in Northern California. We would have to contact those people to determine the availability, and if they were under government inspection, which is another factor, and we would have to determine the price and put an option on it with a payment or control of some type, and from that we made our bid.

Q. Who handled the bidding business in your partnership in the year 1951? A. I did. [28]

Q. (By Mr. Rothert): Mr. Phillips, when you made this survey of the grocery stores, what did you find the situation was as to whether the Hunt products were being sold in the commissary stores at that time?

A. We found, or I found Hunt items in a few stores, in scattering amounts, scattering items and that they were selling very well.

Q. How many separate items in the canned food line did Hunt's have for sale at that time?

A. Items and sizes, I believe around a hundred—items and sizes.

Q. Now, how did the prices of Hunt's products at that time compare to prices of other brands or

(Testimony of L. W. Phillips.)

other lines? A. In the commissary stores?

Q. Yes. A. Resale prices?

Q. Yes.

A. The prices on the shelf in commissary stores of other items, other brands, such as the brands they had, which was Wellman, S & W, Trupak, Sunblest, and Del Monte and Libby, we found, in not all commissaries, but in different commissaries we found those items, and Hunt's would be under those in the commissary stores about 25 per cent.

Q. After you made this survey, did you talk to anybody with Hunt Foods again about this subject? [29] A. Yes.

Q. Who did you talk to next?

A. Mr. Flynn in early September.

Q. And who was present when you talked to him?

A. Mr. Flynn and Mr. David L. Mears and myself.

Q. Who is Mr. David L. Mears?

A. Mr. David L. Mears was at that time a broker or salesman to these different super-markets and restaurants and so forth, selling canned goods. He used to call on us and he was in our office the day I went over.

Q. When you say super-markets you weren't referring to commissary stores?

A. No, no, not referring to commissary stores.

Q. How did he happen to be present when you were talking to Mr. Flynn?

(Testimony of L. W. Phillips.)

A. When I got ready to leave the office, I said, "Dave,"——

The Court: No; how did he come to be present?

A. Well he went with me to see Hunt Foods about canned goods.

Q. (By Mr. Rothert): Did he have anything to do with your business at that time?

A. At that time, no.

Q. Did he have any interest in this subject of your handling Hunt's sales to commissary stores?

A. No. [30]

Q. All right. Now, will you tell the Court what the conversation was in that discussion in early September with Mr. Flynn?

A. I told Mr. Flynn that we were interested in the Hunt line under these conditions: that we knew from the survey that it would ultimately be profitable, but at the present time the price lists in the commissary stores were at practically our cost; we couldn't go in and raise those prices at all because the customer would quit. The only chance we had of making any money on that list he had in those stores was for the market to go up or down, and that I knew that the market, as a rule, moved around during the canning season, which would be the next April, May, June and July. As merchandise is canned, it fluctuates up and down according to what is on hand or what is packed. That we would have to abide by that low price, at cost or below cost, as far as we were concerned, which of course would include our cost of doing business;

(Testimony of L. W. Phillips.)

when I said cost, I meant cost of doing business; that we would have to cut down on our bidding business, reduce it drastically because it was going to take lots of time to sell these commissary stores, and that he knew the time element involved because his men had been calling there.

Mr. Cullinan: If your Honor please, I move to strike what——

Mr. Rothert: What he knew. [31]

Mr. Cullinan: ——that part of the answer that relates to what Mr. Flynn knew.

The Court: It is not clear to me whether the witness said whether he, Flynn, knew this or whether it was his statement.

Mr. Rothert: If I may make a statement to the witness, because I think it throws him off his own track—don't explain things as you are telling us conversations; just limit yourself to what was said. Don't tell us that Mr. Flynn knew something unless you said that he knew it, and don't explain that the packing season changes in April, May, June and July unless that was actually said in the conversation and that was actually in the conversation.

The Court: Go ahead then.

Q. (By Mr. Rothert): Go ahead and tell us further about what this conversation was.

A. And I told Flynn that we at the present time were—had been in contact with Libby, another canned goods packer, to handle their line since I had worked with Libby for seven or eight years and

(Testimony of L. W. Phillips.)

knew their personnel there, but that they had not given us any answer, they were slow in answering us on some kind of a plan which we had with them; that I would be interested in taking Hunt's line if we could have it for a maximum—or a minimum, rather—of ten years, and this being our thinking to Flynn—we told Flynn that it would take us [32] two or three years to get the line up to a profitable basis over our cost of doing business due to the conditions in which it was in in the stores at that time; that it would take us another two or three years to get back a profit on our first two or two and a half years' operations, and that unless we could have it for another five years, we didn't want it at all; that we had a very profitable business, bidding business; that we would make that year between fifteen and twenty thousand dollars; that I would have to give up the bidding business because I didn't have personnel to handle it; that I would have to make the personal calls on the commissary stores myself.

Mr. Flynn said, "Well, Phillips, our trouble with the commissary stores is the fact that our salesmen are held up in there by the hour; they are never there on time; we continually have price troubles; we continually have kicks from our customers that we are selling the commissary stores too cheap and they hear about it from a commissary buyer going and telling them. We want you to take this to eliminate that trouble, and if you will, you can not only

(Testimony of L. W. Phillips.)

have it for ten years but you can have it for as long as you are able to work it."

I said, "That's fine. We will send you a letter making this appointment."

Q. In that conversation was there anything said about [33] whether their salesmen would continue to call on the commissary stores?

A. The plan was made between Mr. Flynn and I that his sales force would not call upon the commissary stores.

Mr. Cullinan: Just a minute, please. If your Honor please, he is stating a conclusion. The question is what was said.

The Court: Yes; just what was said. What did he say and what did he say?

A. I said to Mr. Flynn, "Well, Howard, I understand a salesman's feeling towards an account. Some of your men have been calling on these stores and I would like for them to get credit for our sales." He said, "That they will do. Our sales force will get credit for your sales in the commissary stores so that it will eliminate the friction that could arise when a salesman goes into a territory or is working in a credit because that credit of so many points on our sales goes to the benefit of their sales force."

Q. (By Mr. Rothert): In that conversation was there any mention made of your handling of other lines of canned good products?

A. They told me that I——

Mr. Cullinan: If your Honor please, I would

(Testimony of L. W. Phillips.)

suggest that rather than leading the witness, he ask him what the conversation was without asking him whether something was said [34] about this or that or the other; I think the witness should testify to the whole conversation.

The Court: Well, if it is an involved, long conversation, I never see any objection to referring to a general subject matter as long as the question is not leading, except the witness didn't answer the question. He talked about some plan being made. The question was what was said on the subject of your handling other lines.

Mr. Rothert: Other brands of canned food products.

The Court: Of canned foods.

A. Mr. Flynn said, "It is specifically understood that you will handle our Hunt lines exclusively, and not Libby or Del Monte or any other line."

And I said, "That's our understanding also. We will handle the Hunt line exclusively to the commissary stores."

Q. (By Mr. Rothert): Was there anything said about what territory you would work in on the proposed sales?

A. At that time we had—I will tell you why that was said.

Mr. Rothert: No.

The Court: No. Just state what was said.

A. Well, he said to us, "Could you handle the 11 western states?" And I said, "No, it is too much of a job; we don't have the personnel and we can't

(Testimony of L. W. Phillips.)

do it. We will take Northern California in your territory." And that included all the military bases north of the Kern County line, the [35] southernmost one being Camp Cook at Lompoc, that is the nearest south of San Luis Obispo, and the northernmost base being Beale at Marysville.

Q. What, if anything, did Mr. Flynn say about the territory? A. How is that again?

Q. What, if anything, did Mr. Flynn say about this northern California territory?

A. He said that is the territory we could have.

Q. After that conversation with Mr. Flynn, what did you do next in preparation for this handling of Hunt's sales?

A. What was the next move we made after that?

Q. Yes.

A. At Mr. Flynn's instructions we went to Los Angeles and reported to Mr. Miller.

Q. All right. When did Mr. Flynn instruct you to go to Mr. Miller?

A. Immediately at the conclusion of our conversation that we just talked about.

Q. All right. Did you go to see Mr. Miller?

A. I did.

Q. When?

A. About the 9th of September, if I remember; about that time.

Q. And how long after your conversation with Flynn was it that you went to see Mr. Miller? [36]

A. I would say it was three or four days or five

(Testimony of L. W. Phillips.)

days; it depends on how the weekends fell there. It might have been a week.

Q. And when you talked to Mr. Miller, was there anyone else present?

A. I talked to Mr. Miller in his office at that time.

Q. Was anyone else in his office at that time?

A. No, not as I remember.

Q. What was the conversation you had with Mr. Miller on about the 9th of September down in Fullerton?

A. I told Mr. Miller that Mr. Flynn and I had come to an agreement and told him that Mr. Flynn had told us that we could have the territory for a minimum of ten years or as long as we would like to have it. Mr. Miller said that was all right with him if it was all right with Flynn, because Flynn had charge, and he didn't have anything to worry about. I believe we had lunch together and I came home.

Q. Were there any details at all concerning this arrangement with Hunt mentioned by either you or Mr. Miller in that conversation?

A. I explained to Mr. Miller as I explained to Mr. Flynn generally—I might not have went into as much details—I don't believe I did, because Mr. Miller was very busy and I didn't take the time, because I understood——

Q. Just a minute. I just asked you whether any details [37] were mentioned, not any reasons for their being mentioned or not mentioned. Do you now

(Testimony of L. W. Phillips.)

recall any details concerning this arrangement that were discussed between you and Miller in that conversation?

A. We discussed the no-profit angle and why——

Q. What was said in that regard?

A. I told Miller that we had found out since the last time I saw him that there would be no profit in it for a while and the reasons why.

Q. I want you to tell us what was said. You didn't say, "The reasons why," did you?

A. Well, I told him the reasons why.

Q. What did you say?

A. I said to Mr. Miller, "We found out since the last time I saw you that the price list in the commissary stores was very low and we would have to sell at that list for a while and that we couldn't make any money for two or three years."

Mr. Miller said to me he understood that.

Q. Was the subject of the territory mentioned in that conversation with Miller? Let me withdraw that. Were any of the subjects of territory, length of time, whether or not it was to be exclusive, or any other details mentioned in this particular conversation between you and Miller? [38]

A. I told Mr. Miller we had an exclusive arrangement that we wouldn't feature any other line of canned goods in competition, we would handle Hunt's exclusively. I told Mr. Miller that Mr. Flynn had given us the Northern California territory which was directly under his jurisdiction.

Q. Did you ever talk to Mr. Church of the Hunt

(Testimony of L. W. Phillips.)

Foods Company? A. Yes.

Q. What was his position?

A. He was credit manager.

Q. When did you talk to him the first time other than maybe meeting him? I think you said you might have met him.

A. Yes. I believe that I talked to Mr. Church on this trip that I talked to Mr. Miller.

Q. Did you have any correspondence with Mr. Church?

A. Some time during the month of September I wrote Mr. Church a letter, I believe.

The Court: Do you want to offer that?

Mr. Rothert: I want to offer this.

The Court: You want to offer it in evidence? Any objection?

Mr. Cullinan: No objection.

Mr. Rothert: This is a letter from L. W. Phillips to Hunt Foods, Inc., attention Mr. John Church, dated September 17, 1951. [39]

(Whereupon the letter referred to was marked Plaintiff's Exhibit No. 1 in evidence.)

Q. (By Mr. Rothert): I show you Plaintiff's Exhibit 1, Mr. Phillips, and ask you is that a letter that you wrote on the date that it shows?

A. Yes, sir.

Q. Now, do you recall when you saw Mr. Church, talked to Mr. Church the first time before or after writing that letter?

A. If my memory serves me right, I talked to

(Testimony of L. W. Phillips.)

Mr. Church prior to this letter—met him and talked to him.

Q. Did you have more than one conversation with Mr. Church during the fall of 1951 or just one?

A. I believe just one—one conversation concerning our business connections. We, of course, met and passed the time of day but I think the business session was a result of this letter.

Q. I will ask you to read the last paragraph of Plaintiff's Exhibit 1, and ask you if that refreshes your recollection at all about the times when you may have talked to Mr. Church.

A. The last paragraph?

“I would like to call on you Friday, September 21, and answer any questions you may care to ask. We are anxious to get started with the new crop [40] coming up. Our chances are immediate for a considerable purchasing activity in the resale field. There are several outlets have been buying everything and naturally a line of foods, such as Hunt's, would appeal to them. Would you please advise if the Friday appointment mentioned is O.K.?”

Q. Now, did you see him after this letter of September 17th on or about Friday, the 21st of September?

A. Yes, sir. [41]

Q. Now, when you talked to Mr. Church, what was the subject of your discussions?

A. The subject of our discussion was the basis

(Testimony of L. W. Phillips.)

of this letter pertaining to credit and how much credit we would have to have, and how we were to pay it.

Q. Was anyone else present when you and Mr. Church talked?

A. I don't believe there were, no, just Mr. Church and I.

Q. Will you tell the Court what the conversation was that you had with Mr. Church at that time?

A. Mr. Church told me that he had decided to give us a line of credit of \$5,000, and that we were to pay it—and our discount period would be 2% ten days, and I said, "Mr. Church, our investigation has shown, which we had made previous, that \$5,000 would not be enough for one commissary. It is impossible to have it on \$5,000."

And he said, "Well, that is all right. Do the best you can do." And that was the end of our conversation.

Q. Did you have any further conversations with either Mr. Flynn, Miller or Church after those conversations you have already talked about and before you started actually selling the Hunt line to the commissary stores?

A. I believe in the interim between the starting—I mean in this time between September and December 1st—I wrote Mr. Ried a letter, because he had asked me——

Q. I asked you about conversations, not [42] letters.

(Testimony of L. W. Phillips.)

A. I wrote Mr. Ried a letter, that is all, no other conversation as I remember.

Q. Did you see Mr. Flynn again at any other time?

A. Yes, we saw Mr. Flynn probably three or four times about samples, labels, new prices, found out more about the buying he was doing, and so forth.

Q. Did you see Mr. Miller again after you talked to him the second time, which you said was about September 9th?

A. I don't remember. We might have seen Mr. Miller some time after that but I don't remember that. It seems like we were down there. I don't remember. Maybe I was.

Q. When did you start buying products from Hunt for use in this business of selling to the commissary stores?

A. We began to put a little stock in our warehouse to carry this on I believe October or November, some time in there, if I remember.

Mr. Cullinan: Counsel and I will stipulate that there were purchases made by Wellington Phillips Company from Hunt Foods on October 11th and 12th and 25th of 1951 for delivery to Wellington Phillips Company and marked "Promotional stacking and/or shipping allowance has been deducted."

Q. (By Mr. Rothert): These purchases that I have just described in October, 1951, Mr. Phillips, what were they for?

A. They were for an inventory to carry in our

(Testimony of L. W. Phillips.)

warehouse to supplement other items we might bring in later. [43]

Q. Did you have any sales of the Hunt line to the commissaries that these purchases would fill at that time?

A. Yes, in the month of December we could have. It is impossible for me to answer that question directly.

Mr. Rothert: Will you stipulate that a letter was addressed on November 26th, 1951 by Wellington Phillips Company to Hunt Foods, Attention Mr. Ed Steiger?

Mr. Cullinan: I will.

Mr. Rothert: I would like to offer this copy of that letter as plaintiffs' exhibit next in order.

Mr. Cullinan: I have the original of Mr. Phillips' letter, attached to which is the document referred to in the letter, and which Mr. Phillips suggested in the letter to be used. The document that Mr. Rothert just mentioned is the actual one that was used as modified a little bit. In other words, Mr. Phillips prepared this.

Mr. Rothert: The exhibit I introduced has that also.

Mr. Cullinan: Does it?

Mr. Rothert: Yes. In other words, Plaintiffs' No. 2 has attached to it a form letter like the one you have.

Mr. Cullinan: May I look at the form letter?

Mr. Rothert: That is Plaintiffs' Exhibit 2. I am now offering Plaintiffs' Exhibit next in order, this

(Testimony of L. W. Phillips.)

form letter signed Hunt Foods, Inc., by Howard Flynn, District Sales Manager. [44]

Mr. Cullinan: No objection.

(Form letter referred was thereupon received in evidence and marked Plaintiffs' Exhibit 3.)

Q. (By Mr. Rothert): I will show you Plaintiffs' Exhibit No. 3, Mr. Phillips, and ask you if you can identify that?

A. Yes, sir, I identify the first one. I meant we sent this copy out.

Q. The thing that you have in your hand, what is that? A. This on top?

Q. No, both pieces of paper.

A. A copy of a letter sent out by Mr. Flynn to the military bases.

Q. Did you get some at that time?

A. Yes.

Q. When was that issued?

A. Prior to September 1st and after November 26th or the date of that letter.

Q. Who furnished you with copies of that form letter which is Plaintiffs' Exhibit No. 3?

A. Mr. Flynn.

Q. What use did you make of those form letters after that?

Mr. Cullinan: I will object to that, if your Honor please, as to what use this man made of the bulletins—his part of the arrangement with Hunt is another question—but what use he made of them could not be relevant. [45]

(Testimony of L. W. Phillips.)

The Court: What was done with them?

Q. (By Mr. Rothert): What use did he make of the form letters which Mr. Flynn furnished to him, the copies that he got from Flynn?

The Court: Did you send them out?

A. No, sir.

Mr. Rothert: But Flynn sent him some or gave him some, and I asked him what use he made of the ones he got.

The Court: Do you mean what did he do with them?

Mr. Rothert: Yes.

The Court: Maybe he put them in his file.

Mr. Rothert: What I had in mind is when he called on these commissary stores, he had them in his possession.

The Court: Ask him that question.

Q. When you went calling did you carry some of those with you? A. Yes, sir.

Q. (By Mr. Rothert): When did you start selling Hunt's products to the commissary stores?

A. On or about the 1st of December, 1951.

Q. For how long a period of time did you sell Hunt's products to the commissary stores in that manner?

A. On or about the last week of April, 1953.

Q. From December 1 to late April, 1953?

A. Yes, sir.

Q. How many different military bases or commissary stores [46] did you do business with?

(Testimony of L. W. Phillips.)

A. Approximately 19.

Q. What was the price or price basis which you paid Hunt Foods for the canned foods that you bought from them and then resold to the commissary stores?

A. We bought Hunt foods on a jobber's basis.

Q. (By the Court): You mean the same price that other jobbers paid?

A. Yes, sir.

Q. (By Mr. Rothert): Was there just one jobber price for all jobbers or was there variation in jobbers' prices?

A. I was told there was just one jobbers' price and that was the price list that we got.

Q. In your sales of Hunt food products during this period from December, 1951, to April, 1953, did the volume of sales increase, decrease or remain constant? What was the experience that you had?

A. We had an increase in volume.

Q. What happened as to the number of items of the Hunt line that were sold to the commissary stores during the period of time you were selling?

A. We increased the items in the commissary stores.

Q. When you started out were there any commissary stores that did not have any Hunt's products in there at all?

A. Well, it would be impossible to say that, Mr. Rothert. [47] I would say there was a substantial amount.

(Testimony of L. W. Phillips.)

Mr. Cullinan: Just a minute. If it is impossible to say, I suggest that he not say it.

The Court: Yes. You can't ask it. Ask another question. I suggest that because he will make another talk if you do not. I am not saying this to be critical, but that is the experience with many witnesses. So if the lawyer keeps the thing in hand, we get the facts quicker that way.

Mr. Rothert: Does your Honor intend to continue beyond twelve?

The Court: We might recess until 1:30.

(Recess.) [48]

Afternoon Session—1:30 P.M.

Q. (By Mr. Rothert): Mr. Phillips, in these commissary stores what did you find was the situation as to the number of different brands of an item of canned goods as compared to super markets and big grocery stores?

A. We found a limited number of items in each store due to their restriction on the number of items that they could carry in any given item.

Q. In the ordinary super market, like a Safeway store, Purity, or something like that, how many different items do they carry or how many different brands of the same item do they carry?

Mr. Cullinan: If your Honor please, there is nothing in the record to show that this witness is familiar with what the super markets carry. His

(Testimony of L. W. Phillips.)

business apparently has been in dealing with government commissaries.

The Court: I do not see the materiality of this.

Mr. Rothert: I agree that it may not be material. The number that is carried in the grocery stores may not be as good as it would be if it were compared to, you might say, the civilian business.

The Court: Still I do not quite see the materiality as affecting either the contract or damages.

Mr. Rothert: I will withdraw that question.

Q. How many different brands of a single canned food item [49] were carried in the commissary stores in 1951 when you started this work?

Mr. Cullinan: Are you speaking of a particular commissary store? As I understand it, commissaries differ one from the other.

Mr. Rothert: I think the witness would have to explain that in his answer if there is a difference.

The Witness: No, sir, the regulations——

The Court: Just a minute. What are you trying to show, counsel?

Mr. Rothert: That in these commissary stores they carried only three or four brands of a particular item as distinguished from eight or ten or a large number of brands, so that if a brand was being handled by a commissary store that had fewer competitors in that particular line—for instance, string beans: If there were only three brands of string beans in a store, any one of the three had to compete only with the other two. If there were eight or ten brands of string beans in a store there

(Testimony of L. W. Phillips.)

would be a different competitive situation. As I understand it, the commissary stores were different from the ordinary super markets in that they only carried a limited number of brands of any one item, so that an item that is handled by a commissary store would have only two or three other brands to compete with for the commissary business.

The Court: What is the materiality of that? [50]

Mr. Rothert: I think it would be material to the question of damages. The prospects of obtaining a share of the commissary business——

The Court: You mean it would make it more certain of ascertainment of the damages?

Mr. Rothert: I think so, yes.

The Court: Easier of ascertainment.

Mr. Rothert: Yes.

The Court: You are now in a field in which you are establishing the manner in which alleged damages for the claimed breach of contract are——

Mr. Rothert: In my questioning, I had not gotten to the point of going into damages yet, but I wanted to bring out the various facts and details of his work in selling Hunt Foods and the factors that made the sales to commissary stores a little different from ordinary sales to super markets, for an understanding of the problems and the work that he did.

The Court: What is the materiality of that? Either there is a contract or there isn't one. Either it was broken or it was not. Whether the work was

(Testimony of L. W. Phillips.)

arduous, required a greater intelligence or a moderate amount of intelligence still would not be of any great importance, would it?

Mr. Rothert: We will eventually come to the question of damages, and since the work terminated at a point before he had been able to earn any profit, the damages claimed are [51] going to have to be based on a prospective profit that he could have made had he remained on the handling of the line for the contract period. In effect, it was terminated after he had been promoting the line for a while, and our claim for damages and the plaintiffs' estimate as to the prospects of profits will have to be based upon some of those factors. I think a complete understanding of the particular type of business involved would shed some light on the question.

The Court: That may be so, but I do not know just what you are getting at here. What is the relationship between any prospective loss of profits to whether or not there were fewer lines in the competition of the commissary stores than there were in the general field?

Mr. Rothert: Just for the purpose of argument or discussion of that point.

The Court: It is not worthwhile discussing it. If it is not material, the Court won't give it any weight. You want to establish the point that there were fewer lines——

Mr. Rothert: In the commissary stores they handled only three or four different brands.

The Court: Ask him the direct question.

(Testimony of L. W. Phillips.)

Mr. Cullinan: I would like to interpose the objection, if your Honor please, that I do not think this is relevant to the issues in this case or any issue in this case.

The Court: I am not certain that it is either, counsel. [52] You can either move to strike it or the Court will give it such weight as it is entitled to have. It takes too long to discuss these things just to get in a minor point of evidence. Ask him the direct question, counsel.

Q. (By Mr. Rothert): In the commissary stores, at the time you started in on the Hunt line, how many different items, different brands of the same item did you find were being sold in these commissary stores? A. An average of three.

Q. What was the largest number of brands of the same item that you found in any commissary store? A. Four.

Q. I think you testified during the time you worked on the Hunt line you were able to increase the profit margin on the resale to the commissary stores? A. Yes, sir.

Q. How were you able to increase the profit margin?

A. By selling the new items that had not been priced or sold before in the Hunt line in competition with other items, and by increasing the prices on the merchandise they had previously bought, due to a market condition going either up or down, which would force competition either up or down. I would not go down as far as competition went

(Testimony of L. W. Phillips.)

down and I would go up as far as competition went up. That was our method of increasing the profit. [53]

Q. You spoke about a market condition. Would that market condition affect the price of Hunt's selling price to you? A. Yes.

Q. How would it increase the profit margin if you just raised your prices to the commissary stores by the same amount as the increase of the Hunt's price to you?

A. When this market changed most of the competition would automatically go up as a rule. The market raises up. I would raise up more than the increase to me was. As an example, if the price went up a dollar, and I was under competition a dollar, they would raise a dollar, I would raise a dollar and a half, as an example.

Q. Would that be a case price?

A. That is a case price I am talking about.

Q. I will show you some various invoices from Hunt Foods to you, a memorandum of purchases from commissary stores in various military bases, and ask you if you could refer to any examples where you were able to increase the profit margin in sales to the same commissary stores?

A. We will take, for instance, Camp Cook, which is Lompoc in Southern California——

Mr. Cullinan: What was that again?

The Witness: Lompoc, one of our first sales at Lompoc was made, say, February of 1952, delivery in March of 1952. We grossed on that order one

(Testimony of L. W. Phillips.)

and three-quarters per cent. On [54] a \$581 we made \$10.83 gross. And the same base in April of 1953 we had increased our profit margin to 14½ per cent.

Mr. Cullinan: You mean on a sale made in April, 1953——

Mr. Rothert: May I see what the witness is refreshing his recollection by?

The Witness: November, 1952, this is.

Mr. Cullinan: I didn't understand the testimony. Was it that you grossed \$10 on the whole order that is dated March 20th, 1952?

The Witness: I will have to see it again to identify it, Mr. Cullinan. I have notes on the bottom of the order. This order is 1251, December, 1952, cost us \$403.45.

The Court: You are going over the same matter again. You have testified to that. Let us move along. If there is going to be any accounting in the matter I will refer it to a referee. I am not going to listen to an accounting in this case.

Mr. Rothert: I intended to ask him for some other examples of an increase in the profit margin. If your Honor thinks it would be unnecessary to take the time to do that——

The Court: The other side can cross-examine on it. You sold him some kind of a commodity later on and because there was a change in the market conditions you made more profit, is that right?

The Witness: Yes, sir. [55]

The Court: What is extraordinary about that?

(Testimony of L. W. Phillips.)

Mr. Rothert: I do not think there is anything extraordinary, your Honor.

The Court: What has that got to do with this case for breach of contract? Is it in connection with the claim for damages that he was arriving at a period when it was commencing to get profitable? Is that the point?

Mr. Rothert: Yes, detailed proof of his intention to have to sell the line without profit for a while before he could develop a profit margin for himself and start to make money.

The Court: He has covered that. I don't quite get the point of that though. I should not interrupt your examination, but it is not clear to me on that point. If the market conditions change, then that has nothing to do with—that is a normal thing. But what has that got to do with the idea that he had to sell it at no profit or at a loss for a long period of time?

Mr. Rothert: It was not that market conditions alone enabled him to make a profit, but when there was a market change, he was then able to decrease the spread between the Hunt prices and the competitors' prices and create a marginal profit for himself.

The Court: Why don't you bring that out? Ask him questions along that line. Otherwise it isn't clear to me. [56] Perhaps I should not have interrupted your examination. Maybe I am premature about it.

(Testimony of L. W. Phillips.)

Q. (By Mr. Rothert): Will you explain to the Court, Mr. Phillips, how you were able to get what you have said was a 14 per cent profit on the order in November, 1952, when you only got one and three-quarters per cent profit on the order early in 1952 to the same commissary store in Camp Cook?

A. At the first order in Camp Cook prices had been posted by Hunt Foods, by their sales force. As time progressed we added new items with a profit, a few, and then naturally the old prices were antique at that time and we automatically went up as far as we could toward competition on certain items, and that was our plan when we first started to do that, as we knew from a survey that it made competitive prices.

Q. How much of a spread, if any, was there between the Hunt prices when you started this work and the competitive prices?

A. About 25 per cent.

Q. You have given one example. What was your experience as to the profit margin on sales to other commissary stores other than to Camp Cook?

A. Approximately the same. Our first gross was one per cent and our last gross was nine at the end of 1952.

Q. What do you mean by the last gross? Do you mean an average?

A. Yes. [57]

Q. Was there any occasion when somebody from Hunt Foods went with you to visit the commissary stores?

A. Yes, sir.

Q. Who went with you?

A. Mr. Steiger.

(Testimony of L. W. Phillips.)

Q. When did he go with you?

A. The date I am not able to say. Some time during the month of April, I believe, 1953.

Q. I will show you a letter dated March 6, 1953, and ask you if that is the letter you received from Mr. Steiger of Hunt Foods?

A. Yes, sir, this is the letter and the date I referred to. I was mistaken by about a month.

Q. Does that refresh your recollection as to when Mr. Steiger went out with you?

A. That is right.

Q. When did he go with you?

A. The week previous to March 6.

Q. 1953? A. Yes, sir.

Mr. Rothert: May I offer this letter into evidence, your Honor?

(Letter referred to was thereupon received in evidence and marked Plaintiffs' Exhibit No. 4.)

Q. (By Mr. Rothert): Were there any bases, any commissary [58] stores where you had succeeded in getting a large number of Hunt's items accepted in a store?

A. Two particular bases at the close, at the time they asked us to stop, was Treasure Island and Alameda Naval Air Station, and on this trip with Mr. Steiger—

Q. I haven't asked you about that. Was Mr. Steiger with you at any time when a purchasing officer for commissary stores made statements concerning the handling of the Hunt line?

(Testimony of L. W. Phillips.)

A. Yes, sir, Mather Air Base, which was one of the largest. The purchasing officer told us that due to the service we had given them and being there on a certain date and helping with their price again, selection of items, he was now ready to put in Hunt's line 100 per cent.

Q. Mr. Steiger was present? A. Yes, sir.

Q. Did that occur on the trip that is referred to in Mr. Steiger's letter of March 6?

A. Yes, sir.

Q. Did that similar situation happen anywhere else?

A. A similar situation happened at Mare Island. At that time one of Mr. Steiger's salesmen was living in Vallejo, I believe, and he wanted to take the orders at Vallejo, Mare Island, which was all right with us because we were busy anyway, and when we went in we met a Commander Shea.

Q. When you say "we," who do you mean? [59]

A. Mr. Steiger and myself. Commander Shea and I went in the Navy together. Mr. Steiger found that out and he said, "Well, Phillips, you may as well take this base over, too, and handle it if you have the time."

I said, "We will find the time."

Q. Was anything said about the Hunt line?

A. He said he would put it back.

Q. He would what?

A. He said he would support the line, Commander Shea, and that he would prefer that we have it.

Q. Were there any commissary stores that you

(Testimony of L. W. Phillips.)

did not handle immediately when you started in December 1st, 1951? A. Yes, sir.

Q. Which ones?

A. Hamilton Air Force Base and later on, because they opened and we didn't know it, San Luis Obispo.

Q. Did you eventually handle Hamilton Air Force Base? A. Yes, sir.

Q. What was the occasion for it being taken over by you when you did not start out handling Hamilton Air Force Base?

A. Hamilton Air Force Base—one of the salesmen who lived over there hadn't had any trouble and his business was pretty good. They got ready to transfer. When they got ready to transfer, they asked us to take over the service at that base also, and I have forgotten the date—it is on our [60] invoices—San Luis Obispo opened up a commissary store and I didn't know anything about it. One of their salesmen went in and took the first order. They called us in getting that order to us and told us to service the account, which we did.

Q. In the handling of the Hunt line from December 1, 1951, to the end of April, 1953, do you know whether you made, lost money or broke even on it?

Mr. Cullinan: If your Honor please, I think the books and records of the man would be the best evidence of that, or his income tax returns.

The Court: Did you have any pretrial or preliminary discovery in this matter?

(Testimony of L. W. Phillips.)

Mr. Rothert: We had some depositions.

The Court: Haven't you covered the matter of records?

Mr. Rothert: Books were made available for inspection.

The Court: I am not going to take time to have the books produced and go over the books. That should have been done preliminarily. That is one of the reasons for our rules in the Federal Court. Frankly, gentlemen, in a case that comes here under the diversity jurisdiction, to take a lot of time going over somebody else's books—that is something you could have attended to by yourselves and not taken the time of the Court.

Mr. Rothert: They have been available. I think the witness is entitled to state the general situation, whether [61] or not he made or lost money. If they wish to cross-examine him on it or impeach him on his examination of the books, I think it is a privilege the other party has on cross-examination, or we can call his accountant in and let him give his conclusion of a study of the books if the Court does not want to be burdened with the books.

The Court: I am just saying that is something you could have accomplished in pretrial procedure. A statement of the business of the plaintiffs you could have covered by deposition, request for admissions, interrogatories, demands for production, and so forth, and have a statement made up as to the financial status of the account rather than here

(Testimony of L. W. Phillips.)

in the trial of this case. That does not make sense. [62]

Mr. Cullinan: I think the man's income tax returns would be the best evidence of his profits for the year 1952, or whatever year we are speaking of.

The Court: Not necessarily. The books would be just as good evidence if his testimony is that they are correct. On cross-examination you can go further into it. What I am saying now is why wasn't this done before, gentlemen? The trial is not the time for discovery of the evidence, I don't care how important this is, but technically I think counsel's objection is good; that whether or not there was a profit depends on what his records show if they kept records. He is entitled to object to it on the ground that it is not the best evidence.

Mr. Cullinan: I think that the income tax return would be a good summary of the income and expenses.

Mr. Rothert: That isn't the question I asked him.

The Court: That is not the question. The question was whether or not he made a profit or loss. I have no particular objection to his stating whether he made a profit or a loss, but if it is a question of amount, then the records would have to be produced.

Mr. Rothert: I have no question of amounts.

The Court: I beg your pardon?

Mr. Rothert: I don't intend to make any point of amounts. [63]

The Court: Oh.

(Testimony of L. W. Phillips.)

Mr. Rothert: Just a loss in an undetermined amount or a profit in an undetermined amount.

The Court: All right; let him answer that.

Q. (By Mr. Rothert): During the time you sold the Hunt line to the commissary stores, did you have a profit or a loss or break even on the Hunt business?

A. We lost on the Hunt business.

Q. What was your largest item of expense?

A. Traveling.

Q. Other than the cost of goods that you had to buy from Hunt's? A. Sir?

Q. Other than the cost of the merchandise that you paid to Hunt's, what was your largest item of cost of doing business in handling the Hunt's line?

A. Traveling and billing.

Q. During the time from December 1st, '51, to the end of April, '53, what generally was your status as to paying the Hunt invoices? Did you owe Hunt or did you always keep current or what?

A. We always owed Hunt money. As the business increased the amount we owed them increased, and it got up at one point to \$35,000 and dropped down to the time they closed, of 25. [64]

Q. What was the situation as to how rapidly the government paid you on the sales you made to the commissary stores?

A. The sales—the payments would average 30 days from our billing dates, and the billings dates would be a week ahead—ahead of Hunt's invoices, which would be five weeks, approximately.

(Testimony of L. W. Phillips.)

Q. Did you at one time assign an accounts receivable to Hunt's Food to cover some unpaid invoices of Hunt's Food to you? A. Yes.

Q. Did you sign some trade acceptances covering your obligations to Hunt's Foods on these invoices after the termination? A. Yes, sir.

Q. I show you what purports to be a letter dated April 16, 1953, and a statement of April 16, 1953, signed by Ed W. Steiger, and ask you if you identify that as a letter you received from Hunt's Foods on or about the date that it bears?

A. Yes, sir.

Mr. Cullinan: What was the date of that again, Mr. Rothert?

Mr. Rothert: April 16th.

May I read the letter for the Court's attention?

The Court: Certainly.

Mr. Rothert (reading): "Dear Mr. Phillips: [65]

"Your statement attached appears to be in much better shape than previous statements, in that only 1953 items are listed. We would, however, be much happier if you could clear up all January and February items which are a little beyond what our credit department expects in the way of progress.

"Thank you for your help in getting our statement adjusted to quite a reasonable standard.

"Very truly yours, Hunt Foods, Inc., by Ed W. Steiger, Assistant District Sales Manager."

The Court: Is that Exhibit 5?

The Clerk: It wasn't offered.

Mr. Rothert: I offer it at this time.

(Testimony of L. W. Phillips.)

(Whereupon letter referred to was marked Plaintiff's Exhibit No. 5 in evidence.)

Q. (By Mr. Rothert): At the time that you stopped selling Hunt Foods to the commissary stores, I think you have already testified that that resulted following a phone call from Mr. Steiger?

A. Yes, sir.

Q. When was that phone conversation?

A. I would say it was about the 26th of April, if that fell on a week day, a working day; about that time.

Q. And will you tell the Court what the conversation was you had with Mr. Steiger on that [66] occasion?

A. Mr. Steiger called me and said, "Phillips, we have been advised by Fullerton that Schwartz & Company will take over the selling of Hunt Foods on the first day of May. At that time you will stop."

And I said, "Ed, that is what we have been hearing," and I said, "You fellows know the agreement that you have with us." He said, "I know, but the whole thing is out of our hands and it is out of Miller's hands." That's all.

But that morning I had taken an order for——

Q. Just a minute. A. O.K.

Q. I just asked you about the conversation.

A. O.K.

Q. You said in that answer your statement was "That's what we've been hearing." What are you

(Testimony of L. W. Phillips.)

referring to when you say, "That's what we've been hearing"?

A. As early as the first of March, 1953, I had been told by two different purchasing people that they had been told that we were going to lose the Hunt account.

Q. All right. I will show you what appears to be a copy of a letter dated March 15, 1953, addressed to Lee Miller with the name "Phillips" typewritten on the bottom. What is that?

A. That is a letter I wrote Mr. Miller on the date shown here relative to my hearing again or hearing of the fact [67] that we were going to lose the account.

Mr. Rothert: May I offer this as Plaintiff's exhibit next in order, your Honor? Do you want me to lay the foundation?

Mr. Cullinan: Yes, because it will develop in our testimony that this letter was never received, so I think we ought to have a little more foundation for the introduction of this.

Mr. Rothert: I don't know if counsel is objecting or not, but this appears to be a copy of a letter of March 15, 1953. What did you have to do with any original of that letter? What did you do with it? A. I came back from a sales trip.

Q. Just tell us, did you——

A. I mailed it.

The Court: Did you dictate this letter?

A. No, sir; I wrote it.

Q. What? A. I wrote it.

(Testimony of L. W. Phillips.)

Q. On a typewriter yourself?

A. Yes, as I did most——

Q. And after you wrote it, what did you do?

A. Mailed it.

Q. Yourself?

A. Yes, sir; at this post office. [68]

Q. (By Mr. Rothert): At about the date that appears on the letter? A. The same date.

Mr. Rothert: I would like to offer it at this time.

(Whereupon letter referred to was marked Plaintiff's Exhibit No. 6 in evidence.)

Q. (By Mr. Rothert): I will show you what appears to be a copy of a letter dated April 15, 1953, addressed to Hunt Foods, Inc., attention Mr. Lee Miller, with the typewritten name at the bottom, L. W. Phillips, and ask you to state what that is and what, if anything, you had to do with that paper?

A. I typed this letter also. That is a letter following my next trip 30 days later to these same places where I had heard the same story.

Q. Had you heard a rumor again that Phillips Company was going to be terminated from the Hunt line?

A. Yes, sir. At that time I had heard they were going on supply bulletin. This trip I hadn't heard the supply bulletin story; this one I had.

Q. And when you say "this trip," you had not heard of the supply bulletin?

A. The first one, the March trip, we had no sup-

(Testimony of L. W. Phillips.)

ply bulletin information. I didn't hear of it then. The next trip I heard of the supply bulletin information. That is why I asked to be put on supply bulletin in that letter. [69]

Q. Did you dictate or type this letter of April 15th? A. That's my typing again.

Q. And did you sign and mail it?

A. Yes, sir.

Mr. Rothert: I would like to offer this subsequent letter of April 15th as Plaintiff's next in order.

The Court: Very well.

(Whereupon letter of April 15th, 1953, was received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Rothert): What effect, if any, did these rumors that you have testified to that Hunt's line was going to be taken away from Phillips Company in March and April have on your business of selling to the commissary stores?

A. The bases that heard it, they had been told that they were going to buy it cheaper, and one particular base, Travis Air Force Base, made the statement after I had been working on it for a year, said that—a Major Bradley said, "Phillips, we hear very definitely that you are going to lose the account. Why worry about it? Why come over it every two or three weeks and try to sell us, because we think you are going to lose it. We hear

(Testimony of L. W. Phillips.)

it pretty definitely.” And I got the same information from two or three other spots. [70]

Q. The question is what effect did that have on your sales to the commissary stores?

A. Cut them down.

Q. In this conversation you had with Mr. Steiger was there anything said about the money you owed to Hunt's Foods in connection with terminating your arrangement? A. No, sir.

Q. Did you talk to anybody else after you talked to Mr. Steiger on the telephone about your termination? A. After it was terminated?

Q. At any time after you talked with Mr. Steiger on the telephone on about April 26, 1953, did you talk to somebody else from Hunt's Food about the termination? A. Yes, sir.

Q. Who did you talk to?

A. I called Los Angeles, or Fuller, trying to get hold of Mr. Miller, and I couldn't reach him, and I believe I talked to Mr. Erlanger or Mr. Hooper; I am not sure which of those two men I talked to.

Q. How soon after the talk with Steiger was it that you talked to their Mr. Erlanger or Mr. Hooper?

A. The next few days, as soon as I could get hold of them. I tried to see Miller for a few days, but couldn't get him, so I talked to somebody else; I don't know who it was. I mean I don't remember who it was; I didn't know them personally, so [71] I didn't remember who they were.

(Testimony of L. W. Phillips.)

Q. Is it your testimony you don't know the identity of the person you talked to then?

A. Yes, sir, because I don't know them personally. I was told by Mr. Steiger to call, I believe Mr. Erlanger or Mr. Hooper, who were vice presidents I believe at that time.

Q. What was the telephone conversation you had with either Mr. Erlanger or Mr. Hooper when you called them?

Mr. Cullinan: If your Honor please, I will object to this unless he can identify with whom he talked. He doesn't know either of these gentlemen. He doesn't know which one, if either, he talked to.

The Witness: I talked to one of the two, but I know what I said.

The Court: Well, if you don't know which one you talked to, the proper foundation has not been laid; there is no way of meeting it. That will go out unless the witness can say who he talked to.

Mr. Rothert: Well, I suppose that may be correct. It seems unfortunate that the witness can't remember for sure which one he talked to, that the conversation is excluded.

The Court: It may not be excluded; there may be other ways to get it in.

Mr. Rothert: Yes, I appreciate that.

The Witness: May I ask who the general sales manager was [72] at that time? Was it Mr. Erlanger?

Mr. Rothert: No, but if you talked to somebody who admitted he was the general sales manager or

(Testimony of L. W. Phillips.)

said that he was somebody's superior or said he was in the same office with somebody or something like that, you may have a basis for identification. You called Mr. Miller and you didn't get Mr. Miller?

A. That's right; I couldn't get hold of him.

Q. What happened then?

A. I called Mr. Steiger and he said, "Well, get a hold of Mr. Erlanger or Mr. Hooper." Mr. Erlanger——

Q. Who did you ask for then when you called next?

A. I believe I asked for Mr. Hans Erlanger.

Q. What happened when you asked for Mr. Hans Erlanger?

A. I would say he is the man I talked to.

Mr. Cullinan: I ask that that answer be stricken as not responsive to the question.

The Witness: I definitely say I talked to Mr. Erlanger.

Q. (By Mr. Rothert): Well, you asked for Mr. Hans Erlanger. Then what happened after you asked for Mr. Hans Erlanger?

A. I talked to him on the telephone.

Q. A little while ago you said you weren't sure whether you talked to Erlanger or Hooper. Did somebody come on the phone?

A. Somebody came on the phone.

Q. And what was said when somebody came on the phone? [73]

A. I said to them that they had cut us off awful quick up here.

(Testimony of L. W. Phillips.)

Q. Did you ask anything about who you were talking to or did you just talk to an unidentified voice? A. I asked who I was talking to.

Q. Well, what was said? What did the other voice say?

A. This person said, "Mr. Erlanger." That is the person; I remember now I talked to Erlanger. It may not have been this particular time immediately after they quit, but I talked to Erlanger within a few days after we quit—after they quit us, rather. I was rather upset at that time and I was getting a hold of anybody I could, but I talked to Mr. Hans Erlanger within the week after this termination, and I told him we had been cut off rather suddenly; that we had had an agreement up here——

Mr. Cullinan: Just a minute; I object to the answer as not responsive to the question. I don't know whether we are talking about one conversation or a subsequent one. The one that you are asking about, I don't know whether we are talking about that or one subsequent.

The Court: What conversation did you want to bring out? What conversation did you wish to ask the witness about?

Mr. Rothert: The next conversation with any representative of Hunt's Foods after the phone call from Mr. Steiger telling him that they were not to sell starting May 1st. I [74] asked the witness to explain whether he knows to whom he talked on the very next conversation after Steiger's conversation.

(Testimony of L. W. Phillips.)

The Court: Yes. Can he answer that?

Q. (By Mr. Rothert): Do you know what representative of Hunt's Foods you talked to next after talking to Mr. Steiger on about April 26 on the telephone?

A. The next person I talked to after Mr. Steiger was Mr. Erlanger; I am sure of that now.

Q. And how much after the phone conversation with Mr. Steiger was it that you talked to Mr. Erlanger?

A. Within a period of seven to eight days; I would say ten days.

Q. All right. Will you state what conversation you had with Mr. Erlanger on the telephone on that occasion?

A. I told him that we had been trying to get hold of Mr. Miller for several days and couldn't, and I was advised to call him; and that we had been cut off up here and that we had an agreement with Hunt's to sell their line in Northern California. And he said, well, they didn't have any record of that agreement down there.

I said, "Well, I don't know anything about that; we have it up here. Mr. Flynn made it. And that we have been selling it and we have reduced our bidding business and we want to know if we can't have and maintain Northern California." [75]

He said, "The contracts have already been written with the New York concern and we can't do anything about it."

Q. Is that all the conversation on that occasion,

(Testimony of L. W. Phillips.)

then? A. As far as I can remember.

Q. Did you ever talk to Mr. Miller about the termination? A. Yes.

Q. When, and was it a personal talk or a phone conversation?

A. I don't remember a phone conversation with Mr. Miller after the termination, right immediately after. I went down to see Mr. Miller.

Q. When did you go down?

A. I would say the middle of May.

Q. Did you talk to him? A. Yes, sir.

Q. Was anyone else present? A. No.

Q. What was the conversation you had with Mr. Miller when you saw him down at Fullerton?

A. I asked Mr. Miller what they were going to do about our agreement up here and he said, well, it was out of his hands but that he would try to get the line back for me in July, let them go 90 days—or August. July, I believe he said, the last of July, which would have been May, June, and July—and he would try to get the line back to me at that time.

Q. Did you have a lot of correspondence with Hunt Foods after [76] the termination about the status of your account and the invoices that had not been paid? A. Yes, sir, quite a bit.

Q. That correspondence was mainly with Mr. Church, their credit manager?

A. Yes, sir, that's right.

Q. I show you a copy of a letter from Hunt Foods. Inc., John L. Church, head of credit and collections department, addressed to Wendell Phil-

(Testimony of L. W. Phillips.)

lips Company, dated October 8, 1953, and ask you if that is a copy of a letter you received except for the notation written in pen and ink on the face of it?

A. Yes, sir, this is a letter we received.

Q. That pen and ink notation, was that a notation you made on it?

A. I made it when I got the letter. I made it.

Q. You made it when you got this particular piece of paper? A. That's right.

Mr. Rothert: Shall we stipulate that this notation be disregarded?

Mr. Cullinan: Yes, so stipulated.

Mr. Rothert: I would like to offer this letter of October 8, 1953, as plaintiff's next exhibit in order.

(Whereupon letter of October 8, 1953, referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.) [77]

Mr. Rothert: The only purpose of that, Your Honor, there is a statement in the letter that says:

"In fact I have talked to Mr. Erlanger about the resumption of commissary business and allowing you to handle it on a commission basis. He tells me to ask you to hang on a little longer as the Francois Schwarz matter is being reviewed and I hope one of these days to get this business back for you."

Q. You have testified that you signed some trade acceptances after the termination and that they

(Testimony of L. W. Phillips.)

covered the amount owing on the invoices from Hunt Foods.

A. Yes, sir, I was asked to do that by Mr. Church so that on his books the account——

Mr. Cullinan: Just a minute, if Your Honor please.

Mr. Rothert: All right.

Mr. Cullinan: The question has been answered.

Mr. Rothert: Yes, I will agree to that.

Q. After the termination as of the first of May, 1953, what business activities did you engage in after that?

A. We started to resume our bidding business and we also went into the brokerage business to the domestic trade.

Q. What was the financial condition of your company after the termination as of May 1st, 1953?

A. It was lower than when we started, but our statement of [78] fifty——

Q. Don't tell us what some statement contains. We can produce the statement if we wish to use it —if anyone wishes to use it.

Q. Did you have any capital after you were terminated on the Hunt Food line with which to operate your bidding business?

A. Only accounts receivable.

Q. To what extent were you able to resume the bidding business after that termination?

A. Percentage-wise?

Q. Well, make a comparison of the amount of

(Testimony of L. W. Phillips.)

business you had before you started handling the Hunt line.

A. We were able to bid on probably 25 per cent of our previous bidding.

Q. Was there any——

Mr. Cullinan: If Your Honor please, I move to strike that answer as obviously a guess or a supposition and not based on any factual knowledge that is before the court—it was probably some percentage.

The Court: It is a conjecture only.

Mr. Rothert: I think it is an estimate or an opinion of the witness as to his own business.

The Court: Unless he is using the word “probably” as synonymous with “about.”

Mr. Rothert: If he is using it as synonymous with [79] “about” it would be an estimate.

The Court: Well, ask him the question again.

Mr. Rothert: I think maybe I can get at it——

The Court: He wants to know if you can say now with any degree of certainty the approximate percentage of business you did after the cutting off of this Hunt business with relation to the business you had at the time you took over the business.

A. 25 per cent.

Q. (By Mr. Rothert): Were there any factors that existed in the summer of 1953, affecting the bidding business that were not factors in 1951, before you started the Hunt line?

A. Yes, sir.

Q. What were they?

(Testimony of L. W. Phillips.)

A. Credit and capital.

Q. In what respect was there any difference with your credit and capital in '53, as compared with '51?

A. In '51, we had a line of credit with Overseas Finance and Trading, who was our limited partner; also a line of credit built up on a known profit structure that we had told people about. In '51—or in '53 the profit structure had been eliminated and the line of credit had been disbanded.

Q. You are speaking about the Overseas Finance and Trading Company line of credit?

A. That's right. [80]

The Court: You did no other business except the Hunt business after you took over the Hunt line? A. Did we do any other business?

Q. Yes.

A. We did some. We reduced our bidding business, though.

Mr. Rothert: I think he has previously testified, Your Honor, that prior to the time of the termination the bidding business had been reduced to 20 per cent of what it had been before.

The Court: All right.

Q. (By Mr. Rothert): Had the partnership made money or lost money in 1952, if you know or remember?

Mr. Cullinan: If Your Honor please, I submit the income tax returns are the best evidence whether they made or lost money in the year 1952, otherwise it is a guess or supposition.

(Testimony of L. W. Phillips.)

The Court: Well, he is not asking for any figures. The owner of a business ought to know that much about it.

A. We lost money in '52.

Q. (By Mr. Rothert): At the time of termination can you state about how many different items in the Hunt line you were then selling to the commissary stores?

A. Yes, we know.

Q. How many? A. Average?

Q. No, I didn't ask about average. [81]

A. You mean the highest number in any place?

Q. Yes.

A. 35. The lowest number would be one.

Q. I think you said it was the Treasure Island Purchasing Officer who had stated he would take your entire line. How many items had you sold at Treasure Island?

A. Probably 35. But you must understand when they say entire line they, "We will put it in," they had to eliminate certain other lines to put it in.

Q. Did you have any sales to Treasure Island after that statement by its purchasing officer before you were terminated, do you remember?

A. Yes, as items were eliminated, he would buy that item of Hunt's, replace it with Hunt's instead of some other brand.

Mr. Cullinan: I didn't get that answer.

The Court: Read it.

(Answer read.)

Q. (By Mr. Rothert): Do you know what

(Testimony of L. W. Phillips.)

quantities of Hunt's canned foods you sold to the commissary stores during the period you had the line? A. In 1952 we sold \$94,000 plus.

Q. Did anyone from Hunt's Food ever make any statements to you as to how the business you were doing compared to what they had been doing before you took over?

A. They told us we had doubled it. [82]

Q. Who told you? A. Mr. Steiger.

Q. When?

A. On this trip with us—the March 6th trip with me.

The Court: What was that answer?

Mr. Rothert: "They told us we had doubled it."

The Court: That was the word.

The Witness: Doubled it.

Q. (By Mr. Rothert): Now, in handling the Hunt's line did you have any system or frequency in which you made calls to these commissary stores?

A. Yes, sir.

Mr. Rothert: I might explain, Your Honor. You may be wondering what this line of questioning is for. I want to go into some matters that would be material to the issue of damages and to develop that as the business increased the cost of handling would not, at least in nearly the same proportion, as matters bearing upon the issue of damages.

The Court: You mean the expenses were fixed?

Mr. Rothert: Certain expenses, like making a call on a commissary store with a certain frequency,

(Testimony of L. W. Phillips.)

it wouldn't cost any more for traveling expenses to line up a bigger order than it would a smaller order, and factors of that kind.

The Court: Well, what was the question?

Mr. Rothert: I will repeat it, Your Honor. [83]

Q. (By Mr. Rothert): While you were handling the Hunt's line, what was the frequency with which you called on these various commissary stores?

A. The frequency with each store was the same. The frequency with different stores was different, of course, because they had different inventory periods and different buying day periods and different times of the day when I would see them, but they would remain static all the time.

Q. How often would you go to the commissary stores? Every week, month or quarter?

A. We called on every commissary store at least once a month. At some commissary stores we called twice a month, some commissary stores we called every week, and then at intervals we would go back and leave samples and things of that nature.

Q. I will ask you to assume that the business, the sale of Hunt's products to these commissary stores would have increased if the arrangement had not been terminated. With an increase would there be an increase in the traveling expense of calling on these commissary stores? A. No, sir.

Mr. Cullinan: If Your Honor please, I think first that assumes something not in evidence; secondly, I do not think it is competent, relevant or

(Testimony of L. W. Phillips.)

material in this action as to what might have happened if something else in the future had [84] happened.

The Court: What he is trying to develop is that more business could be done on the same trips, I suppose.

Mr. Rothert: Yes.

The Court: Counsel's objection goes to the fact that it is speculative in the form in which you put it, which may be correct. Ask him what the relationship was.

Q. (By Mr. Rothert): Was there any relationship between the size of the orders you got from the commissary stores and the cost of traveling expense to call on the commissary stores?

A. No, sir.

Q. (By The Court): You mean that the more business you could get from the commissary stores on the set-up you had the more money you could make if it was a profitable business?

A. Yes, sir.

Q. Because of the fact that the expenses were more or less static?

A. That is right.

Q. In a general sense?

A. Yes, sir.

Q. (By Mr. Rothert): Do you have any opinion concerning the quantity of canned foods that were sold by any of these commissary bases during the time you were handling the Hunt's line based on the survey and investigation and observation that you made during that period?

(Testimony of L. W. Phillips.)

Mr. Cullinan: I will object to that as calling for the [85] opinion and conclusion of the witness.

The Court: I am inclined to think that that is an objectionable question.

Mr. Rothert: It calls for an opinion obviously from the very wording of the question.

The Court: How can he tell what business they did in Hunt's foods?

Mr. Rothert: From what information he receives from the purchasing officers.

The Court: That would be hearsay. I wouldn't pay much attention to what John Smith tells me what business the Emporium does. Those things are carried through the channels of hearsay and may become very unreliable.

Mr. Rothert: I appreciate that. We have a problem in this case. The military considers the dollar volume of sales at commissary stores as classified information for security purposes. I have subpoenaed a Colonel of the Sixth Army to be here. I think he will probably be here tomorrow. I am sure he won't give any information.

The Court: What is the purpose?

Mr. Rothert: The purpose of it is merely to show that the amount of canned goods sold in the commissary stores in this area is very large and would not have been a particular limitation on the opportunities of selling Hunt foods just from the volume of business. In other words, if all the [86] commissary stores together only bought, say, \$100,000 of canned goods a month, that would be a definite

(Testimony of L. W. Phillips.)

limitation, but if they bought two or three million dollars a month, then it wouldn't make any difference.

The Court: I think you can safely assume that these commissary stores would buy a larger amount of goods. I do not see that that is any problem. Your problem is whether or not your client was going to get more of that as the years went by.

Mr. Rothert: That is true.

The Court: I think it is not an unreasonable assumption that there is a lot of that merchandise purchased by the commissaries. You could probably get enough information from this Colonel you spoke about at least to develop that without going into the exact figures. Your problem is that out of the California law, as I recall it, you can recover for prospective profits on a breach, but there must be some basis for the testimony. Even the greatest difficulty of proof does not eliminate the right of damages, but you still have to have some basis for an estimate, and to a certain extent I suppose such damages are speculative, because if you start estimating your future profits, you are engaging to a certain degree in speculation.

Mr. Rothert: That is right. I think that in any business—— [87]

The Court: I did not mean——

Mr. Rothert: Is this a convenient time to take the afternoon recess?

The Court: All right, we will take the recess.

(Recess.)

(Testimony of L. W. Phillips.)

Mr. Rothert: Your Honor, I have suggested to Counsel, subject to the Court's approval, that it might be more orderly and save time in the long run if I reserve further questioning of the witness on the issue of damages to permit a sort of marshalling of the facts and his getting together with the records that he would want to refer to this evening and let Counsel start his cross-examination on what has been covered so far.

The Court: Reserving only the matter of damages?

Mr. Rothert: Yes, your Honor, and go into that tomorrow. It might save time of the Court and be more orderly to grope around about it, because these invoices have been scattered and disarranged.

The Court: As long as what is reserved is on a particular subject of damages so we won't get confused about it either, that is agreeable.

Is that agreeable to you, Counsel?

Mr. Cullinan: Yes.

The Court: Have you completed the examination of this witness that you want to make?

Mr. Rothert: Of this witness except on the issue of [88] damages.

The Court: Then you wish to afford Counsel the opportunity to cross-examine at this time?

Mr. Rothert: Yes, your Honor.

Mr. Cullinan: I would like to cross-examine on damages after Mr. Rothert has completed.

The Court: Of course.

(Testimony of L. W. Phillips.)

Cross-Examination

By Mr. Cullinan:

Q. Mr. Phillips, was there any written agreement between you and Mr. Holm and the Overseas Finance Company as to your partnership?

A. No.

Q. No? A. No.

Q. And you have been doing business as a partnership ever since 1951 when it was formed, haven't you? A. Yes, sir—1950.

Q. 1950. Excuse me. And since that time and now you have been working exclusively for the partnership? A. That is right.

Q. Overseas, you say, is a limited partner?

A. Yes, sir.

Q. But it is true, is it not, that in many letters to Hunt Foods you claim that they were a general partner rather than a limited partner? [89]

Mr. Rothert: I am going to object on the ground that it calls for the witness' conclusion and not the best evidence of any letters that he wrote.

The Court: I think that is true, Counsel. It calls for the contents of a written document.

Mr. Cullinan: Yes, your Honor. I will come back to that.

Q. Is there a Wellington Phillips Corporation?

A. Yes, sir.

Q. When was that corporation formed?

A. I don't remember.

(Testimony of L. W. Phillips.)

Q. To refresh your recollection, wasn't it some time in early 1952 that you formed a Wellington Phillips Corporation?

A. Well, if that is what the record shows, it could have been there, as far as I know. You have the information.

Q. Do you remember the occasion of the taking of your deposition, the photostat of an agreement dated May the 26th, 1952, between Linholm of Sweden and yourself was introduced?

A. That is right.

Q. Mr. Linholm was the head of the Overseas Finance and Trading Company, wasn't he?

A. Yes, he is president.

Q. And that agreement, without introducing it at this time, which was dated May 26, 1952, described the formation of this corporation, did it not?

A. That is right. [90]

Q. And the articles had been signed as of the time or before the time that this agreement was Linholm was drawn up?

A. Did you say signed before?

Q. Yes, this refers to a corporation as being in existence, and I think maybe we can just stipulate that it was some time in the early part of 1952 that the corporation was formed.

A. That is about right.

Q. Who suggested the formation of the corporation?

A. Mr. Linholm.

Q. Mr. Linholm?

A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. Did you discuss the formation of this corporation with anyone else?

A. His secretary and treasurer, I believe, Mr. Willy, Norman Willy.

Q. Are those the only ones you discussed the formation of this corporation with?

A. As far as I remember.

Q. Did you discuss it with Mr. Liholm, the plaintiff in this action?

A. I advised Mr. Liholm—he was out of the country at the time—by letter.

Q. And you had planned to dissolve the partnership, to transfer the assets to the corporation, and thereafter do business in a corporate form? [91]

A. At some later date. That was Mr. Linholm's plan.

Q. Was the corporation ever active?

A. No, sir.

Q. Did the corporation ever have any assets?

A. Yes.

Q. When did it first get assets?

A. I don't know that.

Q. What kind of assets did it have?

A. Cash.

Q. Where did it get the cash?

A. From Mr. Linholm.

Q. You mean from Overseas?

A. No, from Mr. Linholm.

Q. Personally?

A. Yes, sir, I believe that is right.

Q. You do not know?

A. I was told.

(Testimony of L. W. Phillips.)

Q. You were president of that corporation, were you not? A. That is right.

Q. Is that corporation still in existence?

A. It has had its name changed but it is still in existence.

Q. It had its name changed just a few months ago, did it not? A. That is right.

Q. But no business was ever done by the corporation? A. No, sir. [92]

Q. At all times since 1951 the partnership has consisted of yourself, Liholm and Overseas Trading and Finance Company, a limited partner?

A. That is right.

Mr. Rothert: Did you use the name Linholm or Liholm?

Mr. Cullinan: Liholm. Just as an aside, there is a Linholm and Liholm. [93]

Q. When did you last see Mr. Liholm?

A. I wouldn't remember.

Q. Well, you haven't seen him since 1951; isn't that a fact? A. I believe that's right.

Q. In fact, you didn't see him in 1951; isn't that a fact? A. Oh, I saw him in '51.

Q. Didn't he go to Sweden in 1950?

A. Oh, I don't remember; I wouldn't want to be explicit about it. It seems as though he was here in '51. You mean during the year that we operated, '51? Well, sure, he was here in '51.

Q. The whole year of '51?

A. I don't know what part of it. He was here some part of the year '51, I am sure of that.

(Testimony of L. W. Phillips.)

Q. He was not around here when you had any dealings with Hunt's? A. No.

Q. Now, Mr. Phillips, you have filed an action in the federal court, No. 34,801, on July 29, 1955, against the Blue Star Company, and that action was filed by you alone, was it not?

A. I don't know that.

Q. The plaintiff in that action is only you, isn't it?

A. I don't know that. Fedder and Ferguson filed the action. [94] I don't know how it was filed; you will have to question them.

Q. And that action is for services rendered by you to Blue Star in the year 1952, is it not?

Mr. Rothert: Your Honor, I am going to object on the ground that this subject of interrogation is incompetent, irrelevant and immaterial and beyond the scope of the direct. I don't know of any connection between that action and the issues in this case.

The Court: Well, I don't know either, counsel.

Mr. Cullinan: It is pertinent in two respects, if your Honor please. The man has testified that he and Liholm were partners and they had always done business as a partnership; he has only been working for the partnership since 1951. Now he comes along and files an action by himself as an individual against a company for services similar to those claimed to be involved in this action for the year 1952, the time he started to work for Hunt's. I think it is material here; that the man is

(Testimony of L. W. Phillips.)

—he is either a partnership or not a partnership. There may be a failure of proof in that regard, if Liholm isn't a partner. If he were a partner he would be in this action.

The Court: Maybe he claims these were separate services that this witness performed or maybe there was an assignment. Anyhow, what difference does it make? He has already testified that he had about 25 per cent of the old business left in [95] '52 when he was working for Hunt. What is the materiality of that?

Mr. Cullinan: To show that the type of services rendered Blue Star is the same type that he is claiming he was going to render to Hunt's Foods.

The Witness: No, sir, it is not.

Mr. Rothert: Oh, you mean to say that he wasn't performing his agreement?

The Court: Is it to controvert the claim that this was an exclusive arrangement with Hunt to sell to the commissaries?

Mr. Cullinan: That he was working for other companies in a similar way that he purports to have been working here.

The Court: You mean selling their products to the commissaries?

Mr. Cullinan: I wanted to find out whether he was selling to the commissaries or not, or where he was selling.

The Court: Oh.

Mr. Cullinan: Also the fact that he testified that he worked exclusively for the partnership during

(Testimony of L. W. Phillips.)

the period. Then how can he file a suit as an individual for services rendered to another company?

The Court: That would be another lawsuit.

Mr. Rothert: That is the problem in that case.

The Court: I think we have got enough to determine in this lawsuit. [96]

Mr. Rothert: Whether or not he has a disagreement or conflict with his partner is not important here.

The Court: It might be admissible to controvert the statement that he acted exclusively with the commissaries for Hunt during this period. To that extent it might be. Otherwise, I don't see the materiality of it, counsel. If there were any question of the equivalent of double jeopardy in a criminal case, if you could be sued again on the same claim, but you have no concern in that regard, because both of these parties are plaintiffs in this action. However, the inquiry would be pertinent to the extent of establishing any rebuttal of the statement that he was engaged exclusively in the commissary business for Hunt. You may pursue it to that extent.

Q. (By Mr. Cullinan): You were not engaged exclusively in the sale of Hunt Foods to the commissaries during the period from December, '51, to April, '53?

Mr. Rothert: Your Honor, I think that is ambiguous. He has already testified that his bidding business was still about 20 per cent of what it had been before. It isn't clear from the question whether

(Testimony of L. W. Phillips.)

he means his business with the commissary stores with exclusively selling Hunt items or whether his business was exclusively the selling of Hunt items in commissary stores and nothing else.

The Witness: In competition. [97]

The Court: No, no, that isn't what I meant by my question.

Mr. Rothert: I didn't think it was what you meant.

The Court: No; I said it would be proper to go into it to the extent of showing that he was not handling Hunt's business exclusively with the commissaries. He has already testified that he had other business—other government business, and he distinguished the commissary business from the general sustenance business, I believe you said.

A. That's right, sir.

The Court: But you have a right to inquire into that. I am not foreclosing counsel from going into that.

Mr. Cullinan: I will come to that.

Q. I will ask you, now, Mr. Phillips, about your first meeting with Mr. Flynn, which was in August of 1951. You had sought a brokerage arrangement as from that time, had you not?

A. As of that time?

Q. Yes.

A. We sought it prior to that time, to the—for the bidding business. We would not go to Mr. Flynn for a brokerage business; we would go to Mr. Ried for that. He had charge of the brokers in the mili-

(Testimony of L. W. Phillips.)

tary setup; he had charge of all the military business that Hunt did. Mr. Flynn or Mr. Miller had nothing to do with it. [98]

Q. You get commissions on brokerage, do you not? A. That's right, sir.

Q. Do you get commissions on bidding business?

A. No. It depends on how it is handled. There are two types of bidding jobbers. There is one type of bidding jobber that bids in the name of the packer; he gets a brokerage. There is another type of bidding jobber that bids in his own name and he doesn't get the brokerage.

Q. Which type of bidding business were you in?

A. We were in some of both. Where we could get bidding and the brokerage, we, of course, got it. That is an added income. That was what I was after Hunt for with Mr. Ried.

Q. When you met with Mr. Flynn in August of '51 you suggested, did you not, a brokerage arrangement on overseas sales?

A. I couldn't; he wouldn't have anything to do with it. That is Mr. Ried's department. I might have said something to him about it, but he would have no authority to handle it; I would have to go to Mr. Ried.

Q. Now, that first meeting with Mr. Flynn in August of '51 lasted just a few minutes, didn't it?

A. Well, I wouldn't say how long. What did you say, a few minutes? I was probably there a half an hour or more.

Q. I call your attention to the question and an-

(Testimony of L. W. Phillips.)

swer in your deposition appearing on page 7, line 10, referring to this meeting: [99]

“Q. How long did that meeting last?

“A. Oh, just a very few minutes.

“Q. Just a few minutes?

“A. Yes, just conversation, you know. I asked them what they wanted to do, what their plans were, how they wanted to handle it, where they wanted me to go, and how much of a territory they wanted me to call on.”

The Witness: That would take about a half an hour.

Q. Now, as of that time, you knew Mr. Flynn casually, didn't you? A. Howard Flynn?

Q. Yes.

A. Well, I had known him for years as being an exsalesman or district manager of CHB Pickle Company, which Hunt's bought out.

Q. I am not asking whether you knew of him.

A. I knew him.

Q. You knew him just casually?

A. I had met Howard several times before.

Q. Well, I call your attention to a question and answer appearing on page 75 of your deposition:

“Q. Now, with respect to Mr. Flynn, you earlier testified about that meeting in September with him. As I understand it, you knew him before that [100] meeting with him?

“A. Yes, I did, casually.”

(Testimony of L. W. Phillips.)

The Witness: That's right. Well, casually, we had had not too many business dealings, but I had known Howard for probably 10 or 15 years.

Q. Then your next meeting with a representative of Hunt's you testified was with Mr. Ried and Mr. Miller, I think you said, in the latter part of August of '51. That was a meeting after this first meeting with Flynn? A. That's right.

Q. And you had gone down there to call on Mr. Ried, had you not?

A. Mr. Miller—Mr. Flynn asked me to go down and see—meet Mr. Miller.

Q. When you went down there you first met with Mr. Ried because he was the one you knew?

A. I called on Mr. Ried and he took me— [101] and he took me and introduced me to Mr. Miller.

Q. In fact, you met in a coffee shop down there at Fullerton; isn't that where you met?

A. No; we ended up in a coffee shop; I met him in his office. I went in to see Mr. Ried and Mr. Ried took me in to see Mr. Miller and Mr. Miller called—he might have called Mr. Church and we all went out and had coffee across the street. Mr. Church's office was four or five hundred yards away from the other office and we met out in the coffee shop after we had discussed what little business we had to discuss.

Q. You don't remember now whether Mr. Church was or was not present?

A. I am not so sure, no.

(Testimony of L. W. Phillips.)

Q. Now, you left that meeting saying that you were going to look over the commissary sales area?

A. That's right; see what the possibilities were.

Q. And then your next meeting after that was with Mr. Flynn in September of 1951; is that right?

A. That's about right.

Q. Will you tell us as near as you can remember what was said and in the order it was said at that meeting? That is the September 6th—roughly September 6th, early September meeting with Mr. Flynn.

A. I said, "Mr. Flynn, I have spent the last few days surveying the commissary stores, ascertaining their volume, [102] possibilities of the business, and it runs into thousands and thousands of dollars. We'll be interested in handling Hunt's line exclusively and sell no other canned goods in competition with you under these conditions"—and I told him that I had found in the commissary stores and from the commissary officers a list of their merchandise that had been left by his sales force and I had been given—I told Howard that I had his jobbing list and my cost on Hunt foods was practically their cost, the only difference being five or ten cents a case.

Q. Now, what—go ahead.

A. And I said, "It will be impossible for us to make any money on Hunt's Foods until the canning season rolls around again or markets go up or down or we get a new item in, because we can't get more for it than you have been quoting."

(Testimony of L. W. Phillips.)

He said, "I understand that, Phillips. We know our people have been selling them and we know that you can't make any money for a while."

I said, "Well, Howard, the canning season comes up next year, so we know that for two years, at least, we won't make a dime due to that condition, over our costs. Then it will take another two or three years to get that profit back that we would have made. And then if we can't have it for another five, which would be a total of ten, we are not interested, because we have now a very successful bidding business and our [103] business is good, our profit is good, and this year we will make around fifteen or \$20,000, because we keep"—the reason I said that to him, we were keeping a running record of our profit as we went along the first year in our business so we knew what we were doing.

But I said, "There is a tremendous business, a million-dollar business, and we would be very glad to take it under those conditions."

And I said, "We are also—have also been talking to Libby, McNeill, and they have said that they would let us handle their line exclusively, but nothing was ever done." And I said, "If Hunt's are ready to go under those conditions, we are ready to go, but we will have to discontinue a great percentage of our bidding business because the sale of canned goods to the commissary stores will require all of my time. I don't have any other personnel, as we just started a year ago to do this bidding

(Testimony of L. W. Phillips.)

work. I don't have a salesman capable of selling the commissary stores."

He said, "Well, Phillips, we want you to take it because that will eliminate our salesmen being held up in commissary stores, it will save us a lot of time. We have"—I believe he said 12 men or 10 men, some number—"and those men now can concentrate on super markets, chains and jobbers. He said, "Our men are being held up in commissary stores as much as half a day in getting an order." He said, "Also we [104] are having complaints from super markets that we are selling commissary stores direct. We want to get away from that so that the super markets won't be mad at our salesmen, and we would like for someone to take it like yourself and to get the prices up more comparable to super market prices."

And I said, "Well, Howard, that can be done; it will take a little while, because the records we have show the difference between my cost and the cost to super markets—the cost of competitive items of like kind in the commissary stores is 25 per cent. We propose to raise your prices 22 to 20 per cent and sell on that basis."

And I said, "If that is agreeable with you, it is agreeable with me."

He said, "Phillips, you cannot only have it for ten years, you can have it for as long as you can sell."

I said, "I will write you a letter, send you a note to send the information out to the commissary

(Testimony of L. W. Phillips.)

stores and buying officers, and you give me a copy to establish the fact that we are your exclusive military jobber and we will go to work." And we went to work and he sent the letter out.

Q. That was the whole conversation at that meeting with Flynn in early September, was it?

A. Essentially, yes. I said something to him about—I said, "Howard, this is rather a drastic change for us from one kind of business to another. We know that we must have [105] your protection. Don't you think we ought to have a written contract, a written letter or something to establish it with us?"

And he said, "Well, Phillips, you have known Hunt Foods a long time, and our promise is all you have to have." And I had known him for a long time and I let it go at that.

Q. Now, Mr. Phillips, in your deposition you were asked to tell everything that was said at that meeting, and in your deposition you made no reference to this asking for a written contract and his stating that you wouldn't need one.

Mr. Cullinan: There is nothing in the deposition of his asking.

Mr. Rothert: What page is his answer about the conversation? Are you looking at that?

Mr. Cullinan: We will get to that.

Mr. Rothert: I will stipulate that in the deposition there is no reference to putting any agreement in writing.

Q. (By Mr. Cullinan): Isn't it a fact, Mr.

(Testimony of L. W. Phillips.)

Phillips, that at that meeting there was no discussion of the need for a written contract or the idea of a written contract?

A. It is a fact that there was a discussion at that meeting with Mr. Mears—at the one Mr. Mears was present at. I talked about another thing.

The Court: No, there is no question before you.

A. O.K. [106]

Q. (By Mr. Cullinan): Mr. Phillips, I call your attention to page 13 of your deposition, line 8, in which you are testifying about this conversation with Mr. Flynn, and in that part of the answer that I am referring to from lines 8 to 10 on page 13, you said to Mr. Flynn:

“And if we couldn’t have it for five years longer, we don’t want it.”

That means five years after the——

A. Five—first five; two and three. We talked about it first.

Q. So you told him then that there would be no profit for at least two years?

A. Two or three years. We would have to have it for two or three more years, which would make about five, and unless we could have it for five more, which would be ten, we didn’t want it.

Q. Was there any discussion about how you would pay for goods sold to you by Hunt’s?

A. Discussion with who?

Q. With Mr. Flynn at this meeting.

A. No.

(Testimony of L. W. Phillips.)

Q. Was there any discussion at this meeting about credit? A. No.

Q. Or how you would pay for the merchandise?

A. No. [107]

Q. And at the conclusion of this meeting Mr. Flynn told you to go and see Mr. Miller?

A. Sir?

Q. At the conclusion of this meeting with Mr. Flynn, he told you to go and see Mr. Miller?

A. He said to tell Miller that we were all set up, ready to go, to tell Miller of our plans. And that is what he told me, which, I believe, I went down and told Miller.

Q. He sent you to Miller after this meeting and you went down to see Miller?

A. He told me to go see Miller when I could, and I went down there, I believe, the next few days, if I remember.

Q. And you went to see Miller to work out some arrangement to act for Hunt's?

A. No; the arrangement had been worked out when I went to see Miller, because each time I would see him he would send me back to see Flynn.

Q. So all the arrangements then were made at this September meeting with Flynn?

A. That's right.

Q. Now, you said you told Flynn at this meeting that you would make fifteen to \$20,000 that year? A. That's right.

Q. That was in September?

A. That's right. That's right. [108]

(Testimony of L. W. Phillips.)

Q. How did you know at that time that you were going to make fifteen to twenty thousand for that year?

A. My recap of our—you see, in the bidding business you buy something and sell it; you have your gross immediately, you know what it is—if you are going to make \$2,000 here, a thousand dollars here, \$900 here; and I kept a running record of that in a looseleaf binder, so I knew, for the benefit of Overseas Finance and Trading. They wanted to know as being the people that saw we got money. And the first year in our business I kept a running record of that, and at that time I knew how much business we were doing and how much profit we would make from what we had done, and that is what I told him. The fact is that one of those months near that was the largest month of the year we had had. So we knew what we were doing.

We also had contracts that were running to be filled and we knew what we made on those when they were filled. So we could speak with authority then.

Q. So you kept a current record of your profits in the business? A. The first year.

Q. During that year?

A. Yes, sir, so we knew what we were doing. We had to answer to Overseas because we had only been in business for a year.

The Court: You have answered it; you did keep a record. [109]

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Now, then, you went down to see Mr. Miller after meeting with Mr. Flynn; I forget whether that was September 9th or 19th; it was some little time after that meeting here? A. Yes, sir.

Q. At that meeting with Mr. Miller was there any discussion about how you were going to pay Hunt's? A. No.

The Court: Gentlemen, I will have to take an adjournment a little early today because I have had a lot of trouble with my teeth and I have to be at the dentist at 4:00 o'clock. And you know how the dentists are, they are worse than judges on time. So we will have to call it quits a little bit early today.

Mr. Rothert: That is satisfactory, your Honor.

Mr. Cullinan: Fine.

The Court: We will meet tomorrow at 10:00 o'clock, then.

(Whereupon, an adjournment was taken until Tuesday, November 29, 1955, at 10:00 o'clock a.m.) [110]

November 29, 1955—10:00 A.M.

The Clerk: Phillips v. Hunt Foods, further trial.

Mr. Rothert: Ready.

Mr. Cullinan: Ready.

L. W. PHILLIPS

resumed the stand in his own behalf; previously sworn.

Mr. Cullinan: Do you prefer to continue with the cross-examination up to the point of damages or do you prefer to go into the issue of damages question?

Mr. Rothert: Just for my own preference, I would prefer to postpone it.

The Court: I think you might just as well complete your examination on the issue of liability first.

Mr. Cullinan: All right, your Honor.

Cross-Examination
(Continued)

By Mr. Cullinan:

Q. Mr. Phillips, when you talked with Mr. Flynn in September of 1951 you knew that he handled the Northern California territory for Hunt Foods? A. Yes, sir.

Q. But you testified on your direct that at that meeting he asked you if you would take over the western states? A. That's right.

Q. It was not within his jurisdiction, to your knowledge, was it? [112] A. That's right.

Q. After the meeting of September, 1951, with Mr. Flynn, you went to see Mr. Miller in Los Angeles? A. That's right.

Q. That was your next contact with a representative of Hunt's Foods, and Mr. Flynn had told you to go down there to see him; isn't that right? A. That's right.

(Testimony of L. W. Phillips.)

Q. And you had never met Miller before?

A. I had met Miller in early August.

Q. That is on the occasion with Mr. Reed?

A. Yes, sir.

Q. That was the meeting in the coffee shop at Fullerton?

A. Well, we ended up in the coffee shop for a cup of coffee. I met him in his office, being introduced by Mr. Reed.

Q. That meeting with Mr. Miller—that was after the meeting with Mr. Flynn—that is after meeting with Mr. Flynn—that meeting just lasted a few minutes?

Mr. Rothert: Mr. Cullinan, are you talking about the first or second meeting with Miller?

Mr. Cullinan: The second meeting after the meeting with Mr. Flynn.

Mr. Rothert: He met with Flynn twice and Miller twice.

Q. (By Mr. Cullinan): After the September, '51, meeting with Mr. Flynn? [113] A. Yes.

Q. When you went down to see Mr. Miller, that meeting with Mr. Miller lasted just a few minutes, as I understood your direct testimony?

A. I believe that is right.

The Court: You have already covered that, counsel, I believe.

Q. (By Mr. Cullinan): Well, if the arrangement was made with Mr. Flynn in September, why did you go down to see Mr. Miller?

(Testimony of L. W. Phillips.)

A. He asked me to go see him to advise him that it was all right; that Flynn was going to O.K. it and have us handle it up here.

Q. Nothing was final, then, with Mr. Flynn? You had to go see Mr. Miller?

Mr. Rothert: I object on the ground it calls for the witness' conclusion and opinion, argumentative.

The Court: Yes; sustained.

Q. (By Mr. Cullinan): Mr. Phillips, on the occasion of the taking of your deposition, and I am referring now to page 32, line 21—page 32, line 21, to page 33, line 22—no, I withdraw that for a moment.

The next meeting you had with a representative of Hunt Foods was the meeting with Mr. Church on September 21st; isn't that so? That is, after the meeting we have just [114] mentioned with Mr. Miller?

A. Well, it is possible that I could have talked by telephone to Mr. Steiger or Mr. Flynn in the interim, because Mr. Steiger, I believe, advised me to go down and see Mr. Church, and that letter I wrote covered that appointment. I believe he must have called me or I called him during that interim somewhere in there, because the letter said Mr. Steiger asked.

Q. In your letter of September 17, 1951, which is Plaintiff's Exhibit No. 1 in evidence, you offered to answer any questions that Mr. Church may have. You went down to see Mr. Church?

A. That's right.

(Testimony of L. W. Phillips.)

Q. To discuss methods of payment, did you not?

A. To discuss the—according to the letter, I went down to discuss any points in the letter he might want to ask about our business or about us.

Q. In that letter you say, “I would like to call you on you Friday, September 21st, to answer any questions you may care to ask”?

A. That’s right.

Q. You went down to discuss how you were going to pay for merchandise sold to you by Hunt Foods?

A. I went down to let him discuss it if he wanted to; it was his problem. He was going to talk to me; he went down [115] to ask me questions pertinent. I went down, and whatever he wanted to ask me he did.

Q. And at that meeting Mr. Church said that he was going to give you a \$2,000 credit limit, did he not? A. No.

Q. How much? A. 5,000.

Q. \$5,000 credit limit. And at that meeting he told you that you would have to pay for the goods ten days after being invoiced for them, did he not?

A. He told me their discount period was ten days after invoice.

Q. He told you that his discount period was ten days? A. Yes, sir.

Q. Did he offer you a discount on a ten-day basis?

A. He didn’t offer us anything; he just said his

(Testimony of L. W. Phillips.)

discount period was ten days, which we already knew.

Q. Was there any discussion of your paying ten days after an invoice? A. Yes.

Q. I call your attention, Mr. Phillips to your deposition, page 31, lines 1 to 3—this question refers to this meeting:

“Q. Was there any discussion of paying ten days after invoice? A. No.” [116]

A. And what date is this?

Q. This is the meeting with Mr. Church on September 21st.

A. I believe I have corrected it over here, both points I knew later. I also said in that deposition that there was no cash discount offered. In looking over our records, we found out a cash discount was offered on our invoices and that is corrected in my copy.

Q. Mr. Church told you, did he not, that you would have to pay ten days after invoice? That was his terms to you?

A. No, no; he didn't say that we would have to pay that. He said that was their terms—cash discount terms.

Q. Did you suggest any different method of paying at that meeting?

A. No; we told him we would pay them when we could.

Q. You told Mr. Church you would pay him when you could?

A. As we could. As we collected our money and

(Testimony of L. W. Phillips.)

we could give it to him, we did. And that is the terms we worked on all along.

Q. And Mr. Church was agreeable to that?

A. He didn't say yes or no as far as I remember. He said to go ahead and do the best we could.

Q. When you started purchasing from Hunt Foods your invoices were stamped, "Payable in 10 Days," were they not?

A. That is right; always.

Q. Right from the start? [117]

A. Automatic stamp, yes, sir.

Q. And you didn't make any protest to stamping your invoices that way, did you?

A. No; all invoices we ever got from anybody were stamped like that.

Mr. Cullinan: I move to strike the balance. It is obviously calling for a yes or no answer.

The Witness: O.K.

The Court: Very well.

Q. (By Mr. Cullinan): Did you ever pay an invoice to Hunt's within ten days after billing?

A. Our records show we paid some.

Q. I call your attention to your deposition, page 38, line 26, to page 39, line 4:

"Q. This letter is dated March 6th, 1952, from you to Mr. Church where you refer to some other payment basis. Wasn't your payment basis at that time ten days after invoice?"

"A. No; we never paid an invoice to them in our life in ten days."

(Testimony of L. W. Phillips.)

A. Well, I have corrected that, because I looked over our records and I find four or five we paid out of the probably four or five hundred that I didn't know anything about when I made that statement.

Q. So that answer was incorrect? [118]

A. That's right; we paid probably four or five invoices. We probably paid \$2,000 of the hundred thousand we paid them.

Q. Mr. Phillips, at that meeting with Mr. Church you gave him, did you not, your 1950 financial statement—partnership statement?

A. Well, when did I meet with Mr. Church? Is that date '51?

Q. On September 21st, 1951. At that meeting you gave Mr. Church a 1950 financial statement?

A. That's right; no doubt I did.

Q. Well, you so testified?

A. He got it, anyway. I think we sent it to him or he had it anyway.

Q. That 1950 financial statement was for a period of three months, wasn't it, October, November and December, 1950?

A. I believe that's right.

Q. And that is all the financial information Mr. Church had at that meeting, isn't that so?

A. I believe that's right, except the questions he asked me.

Q. Is it your testimony that Mr. Church, having a 1950 partnership statement almost a year old covering a three-months' period and not knowing

(Testimony of L. W. Phillips.)

you before, told you you could pay him when you were able and that there was no limit to your credit?

A. He didn't say no limit on the credit; he told me to pay as soon as we could; that they would try to stand back of us [119] in this commissary sales.

Q. When you left that meeting you understood, didn't you, that Hunt's was going to expect payment ten days after invoice?

A. No; that would have been impossible for me to have understood that. It was also impossible for me to understand the \$5,000. I told him that was impossible because that would be used the first week.

Q. Just a minute. You have answered the question. Now, I want to get this clear. Is it your testimony, then, that the head of the credit department of Hunt Foods told you you could pay when you were able and did not place a limit on the credit that they would extent to you?

A. That's my testimony and the record bears it out.

Q. So as far as you are concerned, there were no specific times of payment agreed to at that meeting?

A. That's right, sir.

Q. Now, Mr. Phillips, I hand you a letter of March 6, 1952, from you to Mr. Church and ask you if that is a letter which you sent to Mr. Church?

A. Yes, I typed this. This is some more of my typing and I mailed it.

Q. Now, Mr. Phillips, I call your attention to the first sentence in the second paragraph:

(Testimony of L. W. Phillips.)

“We are wondering if it is possible for some other payment basis to be worked out to allow us a [120] little more time for payment due to the slowness of army payments coupled with the fact that when we received your invoices after which we billed the army basis, there is only in most instances three or four days before payment is due Hunt’s Foods.”

Having that sentence in mind, you asked for some other payment basis. To me that means there was a payment basis between you, wasn’t there?

A. Cash discount.

Mr. Rothert: To which we object, your Honor, as incompetent what Mr. Cullinan interprets it to be, and he shouldn’t ask the witness whether Mr. Cullinan’s——

The Court: Well, it is argumentative.

Mr. Cullinan: Yes, sir.

Q. A payment basis other than what?

A. Than the cash discount basis of ten days. We were trying to get another two per cent apparently there.

Mr. Cullinan: I move to strike the part of the answer that says, “apparently he was trying to get another two per cent.”

The Witness: We were trying to get two per cent. That’s for sure—extended when we paid it.

Q. (By Mr. Cullinan): Let me ask you again: When you referred to a payment basis, another payment basis, you wanted a basis other than [121]

(Testimony of L. W. Phillips.)

what? A. Two per cent ten days.

Q. And that was the basis on which you were being sold?

A. The invoices were stamped that way. To get a cash discount of two per cent was quite a profitable thing. It would be natural we would try to get two per cent in thirty days or 45 days or when it was paid because we weren't making a dime on the thing and we wanted it.

Q. Now, in the first sentence of the third paragraph of this letter you say:

“Could we take an additional week or so?”
Now, additional to what?

A. To the ten-day period, apparently.

Q. So there was a ten-day period under which you were to pay Hunt?

A. Cash discount period.

Q. Do you find any reference in this letter to a cash discount?

A. No, but in the terms of the trade that is what you generally talk about the terms or the cash discount terms.

Q. So you can't tell us, or can you tell us, this additional week was additional to what?

A. To the two per cent.

Mr. Rothert: I think that is answered. He said——

A. In order to get the cash discount. As a rule, bills are paid—— [122]

The Court: No.

(Testimony of L. W. Phillips.)

Mr. Cullinan: Just a moment. You have answered.

Mr. Rothert: Try to limit yourself to the answers, Mr. Phillips.

A. O.K.

Mr. Rothert: And don't volunteer other statements.

Mr. Cullinan: I would like to introduce this letter of March 6, 1952, as our next exhibit in order.

(Letter of March 6, 1952, was thereupon received in evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, I hand you a copy of a letter dated March 14, 1952, from Mr. Church to you. You received that letter, did you not? A. Yes, we received the letter.

Q. I call your attention, Mr. Phillips, to the last paragraph of this letter:

"We prefer any agreement to give you additional time on shipping to army bases until we receive up to date financial information as our decision will depend entirely upon the figures which you furnish us."

There is a reference here to additional time. That is additional to the ten days?

A. That's what I was talking about here. What he was talking about there, I don't know. [123]

Q. Incidentally, you testified on direct that you were able to tell Mr. Church that your income would be \$15,000 or \$20,000 for the year 1951 and that

(Testimony of L. W. Phillips.)

meeting was in September and that you could figure your income would be that because you had current information as to how your business was doing, didn't you?

A. That's right. I made that statement to him.

Q. Why, at this meeting of September 21st, if that were so, was it a 1950 statement that you gave Mr. Church?

A. Because we did not make a statement—I had no statement with me for the months I was talking about. I had only my records I kept. That is why I made the statement to Mr. Church. He asked it.

Q. You didn't have your records with you?

A. No.

Q. But you could tell Mr. Church you were going to make 15 to 20 thousand dollars?

A. That's right.

Q. Which happens to be the amount that you did make? A. That's right.

Q. And this was in September?

A. That's right.

Q. But you didn't give him any of that information; you gave him a 1950 three months' statement; isn't that so?

A. I gave him the record we had. [124]

Mr. Cullinan: I would like to introduce the letter of March 14th just referred to from Mr. Church to Mr. Phillips.

(Whereupon, letter of March 14th, 1952, was received in evidence and marked Defendant's Exhibit B.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Mr. Phillips, I show you a letter of April 22, 1952, a copy of a letter, from Mr. Church to you. A. April, '52?

Q. April 22, 1952. A. We got this one.

Q. You got that letter? A. Yes, sir.

Q. I call your attention to the last sentence of the next to the last paragraph of this letter:

“We have no alternative but to insist that all purchases now being made be paid for within our regular terms, that is, ten days from date of invoice.”

Those were the regular terms of Hunt's, weren't they?

Mr. Rothert: I will object on the ground that that calls for the witness' conclusion as to what Hunt's regular terms were.

Q. (By Mr. Cullinan): Those were your terms with Hunt's, weren't they?

A. They were the cash discount terms. [125]

Q. But there is no reference in this letter to cash discount?

A. No, but when you speak of terms——

Mr. Cullinan: I offer this as our next exhibit.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Q. (By Mr. Cullinan): I show you a letter dated May 1st, 1952, from you to Mr. Church. That

(Testimony of L. W. Phillips.)

is the letter which you sent to Mr. Church on that date, is it not?

A. Yes, sir; I dictated this letter. It was written by my secretary and signed by her but I dictated the letter.

Q. At this time you owed considerable money to Hunt Foods, did you not?

A. The record will show; I don't know exactly what it was.

Q. It was in the neighborhood of \$25,000, was it not?

A. I don't know that. I would have to see the books.

Q. You had suggested that an assignment of accounts receivable from you to Hunt's might be helpful, did you not?

Mr. Rothert: You mean he had before this letter?

Mr. Cullinan: Before this letter, yes.

A. I might have mentioned it prior to the time they got our financial statement in May, which was late. Our financial statement for 1951 was not made until May of '52, as you know.

Q. So as of this time—— [126]

A. And in the interim there——

Q. Just a minute. A. O.K.

Q. Prior to May 1st of '52 you had suggested an assignment of accounts receivable for the protection of Hunt's, did you not?

A. I did. I think I did, yes.

Q. In this letter of May 1st, 1952, you say, "Re

(Testimony of L. W. Phillips.)

your letter of April 22nd and my phone call concerning same."

A. Read that again. Could I have that again, please?

Q. It starts off, "Re your letter of April 22nd"—that is Defendant's Exhibit C, just introduced.

A. Yes.

Q. ——"and my phone call concerning same." That is the opening paragraph. The next paragraph:

"I realize such reports as you have had would make any credit department look with a certain amount of concern on such conditions and I appreciate you writing me as you did so we may get the record straight on paper direct from the operation itself, and I appreciate further the fact that the only thing in the world you have been extending credit on so far has been my word of honor that we would pay and that in most instances is not enough for you as I well realize that you operate with certain rigid credit [127] rules, and if perchance we did not pay, the common saying is 'someone's neck would be way out.' As I have said above, words, of course, cannot express my sincere thanks to you for your very liberal attitude towards us."

At this time, then, you were seeking to have an arrangement by which you would assign accounts

(Testimony of L. W. Phillips.)

receivable and take the pressure off you for the payment of your account?

A. Take the pressure off of Hunt's credit department. The pressure was there.

Q. You did in May assign to Hunt's certain invoices, did you not?

Mr. Rothert: Are you going to introduce that last letter in evidence?

Mr. Cullinan: Yes.

(The letter of May 1st, 1952, was thereupon received in evidence and marked Defendant's Exhibit D.)

Q. On May 12, 1952, Mr. Phillips, you did execute an assignment, a document entitled, "Assignment of Accounts Receivable," did you not?

A. Yes, sir; which proved to be erroneous.

Mr. Cullinan: I am just asking you if you did, and I move to strike the balance of the answer.

The Court: Yes, it may go out.

Q. (By Mr. Cullinan): You were assigning to Hunt's certain [128] invoices for their protection?

A. Give me the total of those invoices.

Mr. Rothert: Well, that is not the answer. Did you assign certain invoices?

The Court: Did you make an assignment of accounts receivable to them?

A. Yes, sir; \$12,000.

The Court: You have answered it. [129]

Q. The moneys that were paid on those invoices

(Testimony of L. W. Phillips.)

were to be paid by you to Hunt's as you got them, weren't they?

A. Paid by us to Hunt's, yes, which we did.

Q. You were to pay those moneys for Hunt's and pay them to Hunt's after you got them?

Mr. Rothert: I think the assignment speaks for itself, your Honor, and it calls for the witness' conclusion as to its legal effect.

Q. (By Mr. Cullinan): Was it your understanding, Mr. Phillips, that these moneys on the assigned invoices were to be delivered by you to Hunt's as you got them?

The Court: What difference does it make, Counsel? If that is what the agreement provided, that is what is binding.

Mr. Cullinan: I will introduce this as our Exhibit next in order.

(Document referred to was thereupon received in evidence and marked Defendants' Exhibit E.)

Q. (By Mr. Cullinan): Referring to your deposition, page 32——

The Court: This assignment does not provide that Phillips shall collect the accounts. This is an assignment of the accounts receivable which gives to Hunt's Foods the right to collect.

Mr. Cullinan: Yes, I was coming to that, your Honor. We might as well cover that right now.

Q. Mr. Phillips, under the assignment you were authorized [130] and you were expected to collect

(Testimony of L. W. Phillips.)

the amounts due on these invoices yourself, were you not?

Mr. Rothert: I think that calls for the conclusion of the witness.

Mr. Cullinan: I am asking him what he expected.

The Court: I am not concerned with that. Ask him what was done with the assignment.

Q. (By Mr. Cullinan): Under the assignment, Mr. Phillips, you collected the various invoices?

A. As shown on that paper?

Q. As shown on this paper or other invoices that followed.

Mr. Rothert: I object on the ground that the other invoices that followed are not pertinent to the assignment, and, therefore, it is a compound question.

Q. (By Mr. Cullinan): Mr. Phillips, this assignment——

A. May I see the paper.

Q. Yes. This assignment lists certain specific numbered invoices?

A. Yes, sir.

Q. Will you read the wording right under that at line 16?

A. Yes.

Q. That says, "and all amounts which may become due and owing to Wellington Phillips and Company, a partnership, in the future arising out of the sales of goods, wares and merchandise by Wellington Phillips and Company, a [131] partnership, purchased from Hunt Foods." It contemplated subsequent invoices?

A. May I give you some information on this?

(Testimony of L. W. Phillips.)

Q. No.

The Court: You spend a lot of time arguing back and forth. Just get the facts. I am not trying to limit your examination, but to get into an argument with the witness is not helpful. What you are trying to find out, I take it, is what actually happened with respect to the collection of these accounts.

Mr. Cullinan: Right.

The Court: Ask him about it.

Q. (By Mr. Cullinan): You selected these accounts, did you not, these and other accounts subsequent to the assignment? A. No, no.

Q. You did not collect these accounts?

A. That is right.

Q. You collected none of these accounts?

A. We collected some of them.

Q. Can you tell us which ones you did not collect?

A. The first two, one for \$8,903, and \$12,000.

Q. The first two items? A. Yes.

Q. Those first two items are what you designated as prebilled, are they not? [132]

A. That is right, they held the merchandise.

Q. They set aside merchandise for you under the prebilling and held them subject to your order?

A. That is right.

Q. These first two total approximately \$12,000?

A. Yes, sir.

Q. Subsequently you were credited back with about \$6,000 of that, isn't that so?

(Testimony of L. W. Phillips.)

A. I don't remember that. The books will show that. I have no idea what that is.

Q. Let us prescind a moment from the first two. The balance of the accounts listed here were collected by you? A. And we paid it to Hunt.

Q. But not as you received it.

A. I believe we paid to Hunt—I wouldn't swear to that, but we paid that money to Hunt. That account has been cleared.

Q. Mr. Phillips, in your direct testimony you said——

The Court: I do not want to interrupt your direct examination, but it is not quite clear to me what the value of this is. It has been agreed that the amounts were owing and that trade acceptances were executed for them and some of those were not paid.

Mr. Cullinan: Later on, but this shows that during the course of the dealings with Mr. Phillips it was very [133] unsatisfactory. They would make a credit arrangement with him and it would fall through, and they would have to come through with another one.

The Court: It was unsatisfactory in the sense that he did not pay the amounts that he owed and then executed trade acceptances for them and some of them were not paid.

Mr. Cullinan: Yes.

Mr. Rothert: That was after.

The Court: There is no dispute about that. I am just wondering what——

(Testimony of L. W. Phillips.)

Mr. Cullinan: The dispute is really threefold: First, it is Mr. Phillip's position that he had no set time in which he had to pay anything.

The Court: I don't quite see the importance of that in this particular controversy, since it is admitted, and there is no dispute about the fact of these purchases, some of which were covered by accounts receivable. The payments were not made, and subsequently trade acceptances were issued for—I believe that was after the termination of the agreement—at the time he was terminated he did owe money that he had not paid. Now, there is no dispute about that. I just do not know what the good is of spending time emphasizing it, unless the claim is made by the defendant that the relationship was terminated because of the failure to pay. But I do not see, since it is not disputed that there was a [134] failure to pay and that there was money owing at the time of the termination which had not been paid, what need there is to take up time in proving something that is not disputed.

Mr. Cullinan: All we were going to prove, your Honor, was that he had not paid, that he agreed to pay right from the start. We finally worked out this arrangement, and then he failed completely on this arrangement, so that during the year or so of the dealings, why, this is one of the kinds of problems were were running into with Mr. Phillips.

The Court: If you terminated the relationship on that basis, that is one of the questions, I suppose, of fact that may be involved, but the fact that there

(Testimony of L. W. Phillips.)

was a failure to pay and money owing is apparently not in dispute.

Mr. Cullinan: The reason for termination, as will be proved—there are many reasons. This is one of them. We will leave the accounts receivable for the moment.

Q. Mr. Phillips, on your direct testimony yesterday you said that after your meetings in August you obtained a price list and you made an analysis of the Hunt lines in the commissaries or the sales of canned goods in commissaries?

A. That is right.

Q. That was in August and before your meeting with Mr. Church? A. Yes.

Mr. Rothert: I don't know if he heard the [135] question.

Mr. Cullinan: The answer was "Yes."

The Witness: I answered "Yes."

Q. (By Mr. Cullinan): In your deposition, from page 32, line 21, to page 33, line 22, you were asked about after the meeting with Church:

"Q. Now, when did you next meet with the representatives of the Hunt Foods? The date which we are talking about there was September what?

"A. September 21. I would say the next time I talked with Hunt's at all would have been a phone call from our office at Hayward, and I don't know that time.

"Q. Would that have been some time shortly after this meeting? A. Yes.

(Testimony of L. W. Phillips.)

“Q. With whom did you talk?

“A. Well, I don’t remember that. I couldn’t possibly remember those things.

“Q. Well, do you remember what the purpose of that particular call was?

“A. The purpose of those calls was to get price lists, samples and of that nature, to start selling, set up our selling force, trying to find out what items were sold.”

Is that true? Was that the purpose of the call, or didn’t [136] you have that information?

A. What items were sold?

Q. You stated after your meeting with Church you made some phone calls to find out the price lists and try to find out what items were sold.

A. To get the price lists. I should have said up-to-date price lists, and when I said what item was sold, I meant what items had been sold since I had been in to see them, the commissary stores.

Q. Had the price lists been changed?

A. It could have been changed every day or two, oh, yes, and sales were made every week.

Q. But this was after your meeting with Mr. Church? A. That is right.

Q. But you testified yesterday that you told Mr. Flynn earlier in September that the price lists were about the same as your costs?

A. That is right.

Q. But it was after your meeting with Flynn and with Church that you were to get to the price lists?

(Testimony of L. W. Phillips.)

A. An up-to-date price list. Hunt changed them every few days, and in order to keep current you had to go back and get other lists.

Q. Isn't it a fact, Mr. Phillips, you did not know the price lists until about three weeks after your meeting with [137] Mr. Church?

A. My friend, I knew the price lists six months before I ever called.

Q. You testified on your direct that in the survey you made in August you ascertained that the merchandise that the commissaries were buying, didn't you? A. That is right.

Q. I will call your attention to your deposition, page 35, lines 3 to 8, where this question and answer were given:

“Q. After that November 12th or November 13th meeting, when did you next meet with a representative of Hunt's?”

“A. Well, it was possible that after that I might have been over at Hayward finishing up our plant and getting a list of merchandise the commissaries had bought and what they had paid for it.”

A. That is right, yes, sir.

Q. So you did not have that information until November 12th or 13th?

A. Every week and every month we bought. We did it to get the current purchases, and that was what we were after there, the current prices. We had to contact them every few days before we

(Testimony of L. W. Phillips.)

started in order to get current purchases and their current prices and their current available stocks.

Q. After you started purchasing Hunt products, Mr. Church [138] frequently asked you for up-to-date financial statements, did he not?

A. The letters show that he did once or twice. I wouldn't say how frequently.

Q. When did you next give him a financial statement? A. After I saw him——

Q. After your September 21st meeting?

A. Mr. Willy sent him the statement, I believe, in the month of May when it was finished.

Q. That would have been the partnership income statement for the year 1951?

A. That is right, sir.

Q. And he got that in the middle of May, 1952?

A. Well, I didn't know when he got it. I have no recollection of that. He got it during May, I believe.

Q. Mr. Phillips, one more question about the accounts receivable. In your deposition, page 48, lines 15 to 18, when you were speaking of the assignment of accounts receivable at that time and you were asked, "That was for the protection of Hunt's?"

"A. That is right, that is right.

"Q. And how was it to protect Hunts? How did you understand it was to protect Hunt's?

"A. Well, to be honest with you, I never knew how it was because we never paid any attention to it. [139]

(Testimony of L. W. Phillips.)

“Q. Neither did they?

“A. That is right.”

You never paid any attention to the accounts receivable assignment?

A. We paid off what was here, but according to them, the interpretation you made, we didn't pay attention to that because we didn't know. We paid what was on this list.

Q. (By the Court): You mean after the specific amounts that were covered by the written assignment had been taken care of, thereafter you did not pay any attention to the assignment of the accounts receivable?

A. No, sir, because I didn't understand it.

Q. (By Mr. Cullinan): And Mr. Phillips, didn't Mr. Church call you many times after this assignment to say that you were not remitting the money as you got it on the items assigned?

A. From the 15th of May, when we got our financial statement down to him? After that?

Q. Yes.

A. I would say he didn't call us very many times if at all. I don't remember him calling us at all. Mr. Steiger would call and say something about payment of certain accounts that were a little old. We would check up and probably send it in. Mr. Steiger watched that thing at this end.

Q. Prior to that assignment Mr. Steiger came to your office and told you that Hunts would not sell you any more [140] merchandise until you paid up your account, didn't he?

(Testimony of L. W. Phillips.)

A. I don't remember that.

Q. But you won't say it did not happen?

A. I don't remember. Paid up the account? That he wouldn't sell us any more?

Q. Until the account was paid up.

A. Well, we didn't pay it up, and we got the merchandise, so I don't know.

Q. Mr. Phillips, you never had a written contract with Hunts, did you?

A. No, not according to the interpretation——

The Court: You have answered.

The Witness: I am sorry.

Q. (By Mr. Cullinan): Isn't it a fact that the only arrangement you had with Hunt was that you were to buy their goods and resell them to the commissaries, and that either one of you could terminate it at any time? A. No.

Q. And that is the customary kind of jobber's arrangement, is it not?

A. No, not exclusive jobber arrangement. That is a jobber arrangement. Exclusive jobber arrangement is a different matter.

Q. Let me refer you to Plaintiffs' Exhibit 1, which was the letter of September 17th, 1951. No, not that. October [141] 2nd. I will show you a letter of October 2nd, 1951, from you to Mr. Wally Reed. Mr. Reed was then at Hunt Foods, was he not? A. That is right.

Q. And he is the Mr. Reed that you mentioned yesterday?

(Testimony of L. W. Phillips.)

A. That is right. I wrote the letter and my secretary signed it.

Q. The last paragraph of that letters states, "It is our aim to promote energetically and continually the Hunt label at all times exclusive in return for the above privilege."

You regarded this not as a contract but as a privilege——

A. We are getting into another field.

Mr. Rothert: Just a minute. I want to make an objection right after he finishes his question, Mr. Phillips.

The Witness: Go ahead.

Q. (By Mr. Cullinan): You regarded the arrangement as a privilege which either one could terminate, didn't you?

Mr. Rothert: May I object on the ground it is ambiguous whether the arrangement he is referring to is the arrangement stated in the letter of October 2nd or the arrangement that Mr. Phillips has testified about that he had with Mr. Miller and Mr. Flynn.

The Court: Counsel asked him a question. I know how he is going to answer it. It is in the argumentative field. I don't want to be didactic, gentlemen, but when you ask an [142] argumentative question, you get an argumentative answer. It is no help to the Court because all I am interested in is getting the facts. It would not make any difference how you felt about it or how he felt about

(Testimony of L. W. Phillips.)

it. It is for the Court to decide what the arrangement was.

Q. (By Mr. Cullinan): It was your understanding of your conversations with Hunt personnel——

A. Mention the name, please.

Q. Mr. Flynn, Mr. Miller—that what you had was a terminable privilege to sell Hunt Food products?

A. No, that letter is Mr. Reed's letter, export department, overseas bases only.

The Court: You are arguing, if you will please stop that, because it takes up so much time and you have able counsel to represent you. They will do the arguing.

Mr. Cullinan: May I ask the Court if that letter of October 2nd is in evidence?

The Court: It has not been offered yet.

Mr. Cullinan: Your Honor, if this is an appropriate time for a recess, I would like to get the correspondence.

The Court: We will take a brief recess.

(Recess.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, to shorten this up a little bit, you did not in any letter written to Hunt Foods in 1952, you at no time in any of those letters claimed [143] any contract with Hunt Foods, did you?

A. I don't believe I did. No, I don't think I wrote a letter about it at all in 1952.

Q. Exhibit A, a letter of March 6th, 1952, where

(Testimony of L. W. Phillips.)

you are asking for additional time for payment, there is no mention of a contract in that letter, is there? A. No.

The Court: Counsel, you just leave the door open for argument when you ask the witness a question whether there is any mention. Your letter speaks for itself and you can point out to the Court what you have in mind in that regard.

Mr. Rothert: I will stipulate to that, your Honor.

Q. (By Mr. Cullinan): I will hand you a letter of May 1st, 1952. It is a photostat of a letter from you to Mr. Church. That letter was written by you, was it not?

A. That is right. My secretary wrote it and she signed it, but I dictated it.

Mr. Rothert: Defendants' Exhibit D, isn't it?

Mr. Cullinan: Yes, we offered that.

Mr. Rothert: Isn't that already in?

Mr. Cullinan: Oh yes, that is already in.

The Court: Yes, that is already in.

Q. (By Mr. Cullinan): I hand you a letter dated May 21st, 1952, Mr. Phillips, from you to Mr. Conrad with copies to Mr. Church and Mr. Howard Flynn. [144]

Mr. Rothert: It is a letter to Mr. Phillips?

Mr. Cullinan: From Mr. Phillips to Mr. Conrad with copies to John Church and Howard Flynn.

Mr. Rothert: May I see that?

Mr. Cullinan: You do not have this one?

Mr. Rothert: No.

(Testimony of L. W. Phillips.)

The Court: Has the letter of October 2nd, 1951, from Phillips to Reed been offered in evidence?

Mr. Rothert: No, sir.

The Court: You have referred to it.

Mr. Cullinan: Yes, I will offer that in evidence.

The Court: Do you want to do that now? I think it is lying on the desk there.

Mr. Cullinan: This is in evidence. This is May 1st. That is March 6th.

The Court: Do you wish to offer the letter of October 2nd 1951, or are you just referring to it?

Mr. Cullinan: I am going to offer it, your Honor.

The Court: I have made a note of it. You referred to it but you did not proceed any further.

Mr. Cullinan: This is the letter of May 21, 1952, from Mr. Phillips to Mr. Conrad.

The Witness: May I see the letter again?

Mr. Cullinan: This is the one you just saw.

The Witness: Yes, I would just like to see something. [145] The numbers mentioned here are on the side.

Mr. Rothert: There is no question, Mr. Phillips. Wait until he asks you something.

Mr. Cullinan: I will introduce this as our next exhibit in order.

(The letter referred to, dated May 21, 1952, from Phillips to Conrad, was thereupon received in evidence and marked Defendants' Exhibit F.)

Q. (By Mr. Cullinan): I will show you a letter

(Testimony of L. W. Phillips.)

from you to Mr. Church, which is undated, but stamped at Hunts "Received June 9th, 1952," and I will ask you if that is a letter you wrote to Mr. Church? A. That is right. I wrote the letter.

Q. And that would have been in June of 1952. It is undated but it is stamped "Received June 9th, 1952." A. That is right.

Mr. Cullinan: I will offer that as our next exhibit.

(Letter referred to stamped June 9th, 1952, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit G.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, in the latter part of April, 1953, a representative of Hunts stated they were no longer selling to you for resale to commissaries, is that so?

A. Yes. [146]

Q. Mr. Steiger and Mr. Miller informed you of that? A. Mr. Steiger informed me.

Q. Wasn't Mr. Miller present?

A. Mr. Steiger called us on the telephone.

Q. Did you have a meeting with Mr. Miller and Mr. Steiger at the time of the termination ?

A. At that time?

Q. Yes. A. Not that time.

Q. What was it, the next day?

A. I don't remember.

Q. I will hand you a letter dated April 15th. It is dated 1853 but I assume it was 1953.

(Testimony of L. W. Phillips.)

The Court: April 15th, 1953?

Mr. Cullinan: Yes, your Honor.

Q. That is the letter from you to Mr. Lee Miller?

A. That is right.

Q. And that is a copy of the letter. That letter was sent? A. I wrote the letter.

Q. That is a copy to Mr. Steiger?

A. Well, I don't know whether he got the copy or not. I wrote the letter.

Q. And you sent a copy of it to Mr. Steiger, did you not? I will show you the postscript. Is that postscript in your handwriting? [147]

A. That is right.

Q. "Dear Steiger—Dear Ed, for your information." A copy of this letter from Mr. Miller was sent to Mr. Steiger?

A. That apparently was a copy.

Mr. Cullinan: We will offer this as our next in evidence.

(The letter referred to, dated April 15, 1953, from Phillips to Miller, was thereupon received in evidence and marked Defendants' Exhibit H.)

Q. (By Mr. Cullinan): I hand you a letter, Mr. Phillips, dated June 1st, 1953, from you to Mr. Church and ask you if that is the letter you sent to Mr. Church on that date? A. That is right.

Mr. Cullinan: I will offer that as our next in evidence.

(Testimony of L. W. Phillips.)

(Letter dated June 1st, 1953, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit I.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, dated June 15th, 1953, to Mr. Church, attached to which is a copy of a partnership income tax return of 1952, and I will ask you if that is the letter which you sent to Mr. Church?

A. Yes, sir.

Mr. Rothert: May I see that? I have a copy of the letter but I do not have a copy with a partnership return on it.

Mr. Cullinan: We offer this as our next exhibit, your [148] Honor.

(Document referred to, a letter dated June 15th, 1953, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit J.)

Q. (By Mr. Cullinan): I hand you a letter also dated June 17th, 1953, from you to Mr. Church.

Mr. Rothert: I do not think I have that.

The Court: A letter to whom?

Mr. Cullinan: To Mr. Church, June 17th, 1953.

A. I wrote that, typed it myself.

Mr. Cullinan: I offer this as our next in evidence.

(The document referred to, a letter dated June 17th, 1953, from Phillips to Church, was

(Testimony of L. W. Phillips.)

thereupon received in evidence and marked Defendants' Exhibit K.)

Q. (By Mr. Cullinan): I will hand you, Mr. Phillips, a copy of a letter from Mr. Church to you dated June 30th, 1953, and ask you if you received that letter?

A. That is right, we received this letter.

Mr. Cullinan: I will offer this as our next exhibit.

(Document referred to, a letter dated June 30th, 1953, from Mr. Church to Mr. Phillips was thereupon received in evidence and marked Defendants' Exhibit L.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, dated July 2nd, 1953, from you to Mr. Church and ask you if that is a letter you sent to Mr. Church? [149]

A. I sent this to Mr. Church, yes, sir.

Mr. Cullinan: I will introduce that, if I may, as our exhibit next in order.

(The document referred to, a letter dated July 2nd, 1953, from Mr. Phillips to Mr. Church, was thereupon received in evidence and marked Defendants' Exhibit M.)

Q. (By Mr. Cullinan): Now, I hand you a copy of a letter from Mr. Church to you dated July 8th, 1953, and ask you if that is a letter which was received by you?

A. We received this letter, yes, sir.

(Testimony of L. W. Phillips.)

Mr. Cullinan: I will introduce this as our exhibit next in order.

(Document referred to, a letter dated July 8th, 1953, from Mr. Church to Mr. Phillips, was thereupon received in evidence and marked Defendants' Exhibit N.)

Q. (By Mr. Cullinan): Mr. Phillips, I hand you a letter dated July 14th, 1953, from you to Mr. Church and ask you if that is a letter which you sent on that date to Mr. Church? A. Yes, sir.

Mr. Rothert: I do not have a copy. May I see it?

Mr. Cullinan: We will offer that as our next in order.

(The document referred to, a letter dated July 14th, 1953, from Phillips to Church, was thereupon received [150] in evidence and marked Defendants' Exhibit O.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, dated July 28th, 1953, from you to Mr. Church. A. I wrote the letter.

Q. That is your letter? A. Yes.

Q. There is a postscript on this letter, Mr. Phillips. Is that in your handwriting?

A. Yes, I wrote that.

Mr. Cullinan: I offer that as our next exhibit.

(The document referred to, a letter dated July 28th, 1953, from Mr. Phillips to Mr. Church, was thereupon received in evidence and marked Defendants' Exhibit P.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): I will hand you a letter dated August 18th, 1953, addressed to "Dear John." That would be John Church, would it not?

A. That is right.

Q. It is dated August 18th, 1953. That is a letter you sent on that date to Mr. Church?

A. Yes, sir.

Mr. Cullinan: I offer that as our next exhibit.

Mr. Rothert: May I see that one?

Mr. Cullinan: I offer that as our next exhibit.

(The document referred to, as letter dated August 18th, 1953, from Phillips to Church, was thereupon received [151] in evidence and marked Defendants' Exhibit Q.)

Q. (By Mr. Cullinan): I will show you a letter of September 3rd, 1953, Mr. Phillips, from you to Mr. Church, with some photostats attached, and ask you first if that is a letter which you sent to Mr. Church on September 3rd, 1953?

A. That is right.

Q. And in it you enclose copies of certain contracts with the government?

A. That is right.

Q. Which are attached?

A. Yes, sir.

Mr. Cullinan: I will introduce that letter of September 3rd as our next in order.

(The document referred to, letter dated September 3rd, 1953, from Mr. Phillips to Mr. Church, was thereupon received in evidence and marked Defendants' Exhibit R.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Mr. Phillips, I hand you a letter dated September 23rd, 1953, addressed to Mr. Church signed by you. That was a letter that you sent to Mr. Church on that date?

A. Yes, I did.

Mr. Cullinan: We offer this as our next in order.

(The document referred to, a letter dated September 23rd, 1953, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit S.) [152]

Q. (By Mr. Cullinan): I will hand you a letter dated October 5th, 1953, Mr. Phillips, from you to Mr. Church, and ask if that is a letter you sent to Mr. Church on that date? A. Yes, sir.

Q. And that has certain attachments to it, copies of government awards which were attached to the letter.

A. Yes, open end contracts.

Mr. Cullinan: We will offer that as our next in order.

(The document referred to, a letter dated October 5th, 1953, was thereupon received in evidence and marked Defendant's Exhibit T.)

Q. (By Mr. Cullinan): I will hand you a letter, Mr. Phillips, to Mr. Church, dated October 23rd, 1953, with a tape attached to it. That letter was sent by you to Mr. Church? A. I did.

Q. And the tape attached is one that was affixed by you to the letter, is it not? A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. The tape attached relates to accounts receivable, accounts owing to you at that time, does it not?

A. The body of the letter explains it.

Q. The body of the letter explains it?

A. Yes, sir.

Mr. Cullinan: We offer this as our next exhibit.

(Document referred to, a letter dated October 23rd, [153] with a tape attached, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit U.)

Q. (By Mr. Cullinan): I hand you a photostat of a letter from Joseph R. Harman to you, the Wellington Phillips Company, dated December 8, 1953.

The Court: From whom?

Mr. Cullinan: Joseph R. Harman.

Q. Joseph R. Harman is the attorney for Hunt Foods, is he not? A. Southern California, yes.

Q. You received this letter dated September 8th, 1953? A. We received that.

Mr. Rothert: Your Honor, I am going to object to this particular letter on the ground it is incompetent, irrelevant and immaterial. It is from an attorney representing Hunt Foods and is about the trade acceptances, which it is, of course, admitted were executed and not fully paid.

Mr. Cullinan: The purpose of this letter, if your Honor please, is this: It will be shown from subsequent correspondence that after an attorney wrote to Mr. Phillips is when he starts claiming a contract in 1954.

(Testimony of L. W. Phillips.)

Mr. Rothert: Except for a letter in March or April, 1953.

Mr. Cullinan: These are two or three letters that are coming in. [154]

The Court: Let me see it. Well, all of these letters are in the nature of an account that is owing. I will overrule the objection.

(The photostat of letter from Harman to Phillips dated December 8th, 1953, was thereupon received in evidence and marked Defendants' Exhibit V.)

Q. (By Mr. Cullinan): I will hand you a letter dated January 6, 1954, from the same Mr. Harman to you and ask you if you received that letter?

A. Yes, sir.

Mr. Cullinan: I will introduce this as our next in order.

Mr. Rothert: I would like to make the same objection as I made to the letter that is now Defendants' Exhibit V, on the grounds it is merely a letter for collection by an attorney for Hunt Foods.

The Court: Well, it is a similar letter. I don't know the importance of it, but let it be marked.

(The document referred to, a letter dated January 6, 1954, from Harman to Phillips, was thereupon received in evidence and marked Defendants' Exhibit W.)

Q. (By Mr. Cullinan): Mr. Phillips, I hand you a photostat of a letter from you to Mr. Harman

(Testimony of L. W. Phillips.)

dated January 15th, 1953, with a correction to 1954.

A. 1954 is correct.

Q. This copy was given to me by your counsel. Did you write [155] such a letter to Mr. Harman on January 15th, 1954?

A. Yes, sir.

Q. And that letters refers to—

May I see it— to his letter of December 8th, 1953.

(The document referred to, a letter from Mr. Phillips to Mr. Harman dated January 15, 1953, was thereupon received in evidence and marked Defendants' Exhibit X.)

Q. (By Mr. Cullinan): I hand you a letter dated March 2nd, 1954, signed by you and addressed to Harman and Herlands, that is, Mr. Joseph Harman, and ask you if that is a letter which you sent to them on March 2nd, 1954?

A. Yes, sir.

(The document referred to, a letter dated March 2nd, 1954, from Mr. Phillips to Mr. Harman, was thereupon received in evidence and marked Defendants' Exhibit Y.)

Q. (By Mr. Cullinan): I will hand you a letter dated March 5th, 1954, from Mr. Church to you, and with a footnote on it to Mr. Church with your name typed in. Is that a letter which you received from Mr. Church?

A. Yes, sir.

Q. And that footnote was typed by you and the letter sent back to Mr. Church?

A. Yes.

Mr. Cullinan: I will offer that as our exhibit next in order.

(Testimony of L. W. Phillips.)

(The document referred to, being a letter dated [156] March 5, 1954, from Mr. Church to Mr. Phillips, was thereupon received in evidence and marked Defendants' Exhibit Z.)

Q. (By Mr. Cullinan): I will hand you a letter dated April 15th, 1954, Mr. Phillips, addressed to Mr. Church, and ask you if that is a letter which you wrote to Mr. Church? A. Yes, sir.

Mr. Rothert: What is that date?

Mr. Cullinan: April 15th, 1954.

(The document referred to, a letter dated April 15th, 1954, from Phillips to Church, was thereupon received in evidence and marked Defendants' Exhibit AA.)

Q. (By Mr. Cullinan): I will hand you a copy of a letter dated April 20th, 1954, from Mr. Church to you, and ask you if you received that letter?

A. Yes, sir.

Mr. Cullinan: I will introduce that as our exhibit next in order.

(Document referred to, a letter dated April 20, 1954, from Mr. Church to Mr. Phillips, was thereupon received in evidence and marked Defendants' Exhibit AB.) [157]

Q. (By Mr. Cullinan): I hand you a letter dated April 23, 1954, from you to Mr. Church and ask you if you sent that letter. A. Yes, sir.

(Testimony of L. W. Phillips.)

(Letter of April 23, 1954, was thereupon received in evidence and marked Defendant's Exhibit AC.)

Q. (By Mr. Cullinan): I hand you a copy of a letter dated April 30, 1954, from Mr. Church to you and ask you if you received that letter.

A. Yes, sir.

(Letter of April 30, 1954, was thereupon received in evidence and marked Defendant's Exhibit AD.)

Q. (By Mr. Cullinan): I hand you a copy of a letter dated June 17, 1954, from Mr. Church to you and ask you if you received that letter.

A. Yes, sir.

Mr. Rothert: I don't have that one.

The Court: What was that one?

Mr. Cullinan: That is June 17, 1954. I will introduce that as our next exhibit.

(Letter of June 17, 1954, was thereupon received in evidence and marked Defendant's Exhibit AE.) [158]

Q. (By Mr. Cullinan): I hand you a letter dated July 10—there is no year on it; it has a July '54 receipt, addressed from you to Mr. Church, and ask you if that is a letter which you sent to Mr. Church on July 10th, 1954.

A. Yes, sir.

Mr. Rothert: May I see that one before you offer it?

(Testimony of L. W. Phillips.)

Mr. Cullinan: I offer the letter of July 10th, 1954.

(Letter of July 10, 1954, was thereupon received in evidence and marked Defendant's Exhibit AF.)

Q. (By Mr. Cullinan): I hand you a letter of July 15, 1954, from Mr. Church to you and ask you if you received that letter. A. Yes, sir.

Mr. Rothert: May I see that?

Mr. Cullinan: I offer that as our next exhibit.

(Letter of July 15, 1954, was thereupon received in evidence and marked Defendant's Exhibit AG.)

Q. (By Mr. Cullinan): I hand you a letter dated July 20, 1954, from you to Mr. Church and ask you if you sent that letter. A. Yes, sir.

Mr. Rothert: May I see that before you offer it?

(Private discussion between counsel.)

Mr. Cullinan: I am not offering the letter just referred [159] to at this time, your Honor.

Q. I show you a copy of a letter from Mr. Church to you, Mr. Phillips, dated July 29, 1954, and ask you if you received that from Mr. Church.

A. Yes, sir.

Mr. Cullinan: I will offer that as our next exhibit.

(Letter of July 29, 1954, was thereupon received in evidence and marked Defendant's Exhibit AH.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): I hand you a letter dated August 3, 1954, from you to Mr. Church and ask you if that letter was sent by you to Mr. Church.

A. Yes, sir.

Q. And the footnote——

A. Is my writing.

Q. Is your writing? A. Yes, sir.

(Letter of August 3, 1954, was thereupon received in evidence and marked Defendant's Exhibit AI.)

Mr. Cullinan: And I hand you a copy of a letter dated August 9, 1954, from Mr. Church to you and ask you if that was received.

A. Yes, sir, we received that.

(Letter of August 9, 1954, was thereupon received [160] in evidence and marked Defendant's Exhibit AJ.)

Q. (By Mr. Cullinan): I hand you a letter dated September 9, 1954, from you to Hunt Foods, attention Mr. Church, and ask you if you sent that letter. A. Yes, sir.

Q. And the footnote on that letter is in your handwriting? A. Yes, sir.

Mr. Rothert: May I see that one?

Mr. Cullinan: I offer the letter of September 9th, your Honor, as Defendant's next in order.

(Whereupon, letter of September 9, 1954, was received in evidence and marked Defendant's Exhibit AK.)

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): I show you a letter dated September 22, 1954, from you to Mr. Church and ask you if you sent that letter to Mr. Church?

A. Yes, sir.

Mr. Rothert: Let me see that one.

Mr. Cullinan: I will offer that letter of September 22nd as our next exhibit in evidence.

(Whereupon, letter of September 22, 1954, was received in evidence and marked Defendant's Exhibit AL.)

Q. (By Mr. Cullinan): Now, Mr. Phillips, at the time Mr. [161] Steiger—you say it was just Mr. Steiger and not Mr. Miller who advised you that Hunt's would no longer sell to you?

A. The first notice we had was from Mr. Steiger, yes, sir.

Q. And at that time you owed Hunt's approximately \$27,000, did you not?

A. Twenty-five, I believe.

Q. About \$25,000? A. Yes, sir.

Q. And some of that indebtedness was for invoices that had been billed to you four months or more before that date?

A. I wouldn't know that.

Q. You don't know that? A. No

Q. After they stopped selling to you during the year 1953, you asked representatives of Hunt's did you not, whether they would consider taking you on a supply bulletin basis? A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. You made many requests during 1953 to be considered on a supply bulletin basis, didn't you?

A. Only one, if I remember correctly, in a letter.

Q. Most of your dealings with Hunt's after April, '53, were with respect to how to pay off your indebtedness, weren't they?

The Court: You are getting into an argumentative field, counsel. You have introduced the letters in evidence.

Q. (By Mr. Cullinan): Now, Mr. Phillips, I am referring now [162] to Plaintiff's Exhibit No. 6. You testified that you wrote that letter to Mr. Lee Miller and that you mailed it yourself.

Mr. Rothert: I don't think he could tell which letter it is by the exhibit number.

Mr. Cullinan: Excuse me; March 15, 1953, Plaintiff's Exhibit 6 (showing document to witness). You can hold that. I have a copy of it.

Q. That letter, Mr. Phillips, you testified you typed that yourself.

A. Yes, sir.

Q. And you typed it on a Sunday, did you say?

A. That's what the letter says.

Q. You don't remember whether it was a Sunday or not?

A. It was a Sunday because I came back from a trip, and this is no doubt on a Sunday.

Q. Where did you type this letter?

A. In our office.

Q. In your office. Was anyone else present when you typed it?

A. No.

(Testimony of L. W. Phillips.)

Q. And did you mail it yourself?

A. I mailed the letter at the post office here with other mail. I would do other mail and bring it all in together.

Q. Do you have any independent recollection of having mailed the letter March 15, 1953? [163]

A. You mean an independent recollection of the letter itself?

Q. Yes.

A. All the letters that I would have made up this day are bids that I would send in. I mailed them.

Q. Do you have a specific recollection of having mailed this particular letter?

A. Well, it is four years ago. I would say that I couldn't tell you the minute it was mailed or the hour of the day, but when I come back from a trip I would answer letters and in that bunch of letters was this letter.

Q. You have no specific recollection of mailing this particular letter on March 15, 1953?

A. I would have no specific recollection of that letter itself exactly, but it was mailed that day.

Q. What time of day did you prepare that letter?

A. It would be in the morning.

Q. In the morning?

A. Yes, sir.

Q. Is there something that causes you to remember it was in the morning?

A. I would always go down in the morning before we went to church and make the work up and then go home.

Q. In this letter you state in the opening para-

(Testimony of L. W. Phillips.)

graph that "It has come to me about this matter of Hunt's taking the line [164] away from us and giving it to someone else." How long before this letter had you heard of Hunt's taking the line away from us and giving it to someone else?

A. Probably two weeks before. I think I can give you the exact date from memory.

Q. I hand you Plaintiff's Exhibit No. 7, a letter dated April 15, 1953—dated one month later.

A. Yes, sir.

Q. Let me read the first paragraph of this letter.

Mr. Cullinan: This letter, incidentally, your Honor, is the same as Defendant's Exhibit H. Our H and Plaintiff's 7 are the same.

Q. The first paragraph of the April 15th letter also addressed to Lee Miller says:

"During the past few weeks in covering the different commissaries, word has come to us that Hunt's will be on a supply bulletin in the very near future and that some other concern will be handling the line."

Now, in the March 15th letter the opening paragraph says:

"It has come to me again about this matter of Hunt's taking the line away from us and giving it to someone else."

On April 15th you refer to the "past few weeks" hearing about some other concern handling the [165] line.

(Testimony of L. W. Phillips.)

A. Yes, sir. Do you want me to explain it?

Q. Does that mean that between March 15th and April 15th you had heard the line was going to be taken away from you?

A. I heard of the line being put on a supply basis. We didn't know that on March 15th; we had heard rumors of them going to stop. The supply bulletin was a different matter.

Q. It is your testimony that prior to March 15th you had heard that the Hunt's line was going to be taken away from you? A. That's right.

Q. So, therefore, you went down on a Sunday and wrote this letter to Mr. Lee Miller on March 15th. A. This one, yes.

Q. In between March 15th and April 15th you didn't write any letters to Lee Miller?

A. I have no record of it.

Q. Your next letter is April 15th and that is to Lee Miller?

A. That was the next round, yes, sir.

Q. In that one you refer to hearing that some other concern will be handling the line.

A. The supply bulletin is the matter of the letter.

Q. Did you ever get an answer from Mr. Lee Miller to your letter of March 15, 1953?

A. No, sir.

Q. But in your letter of April 15, 1953, you make no reference to the prior letter or failure to get an answer to that [166] letter. A. That's right.

(Testimony of L. W. Phillips.)

Q. Is there any reason for not mentioning this letter or Miller's failure to answer that letter?

A. Yes, sir.

Q. What was the reason that in the April 15th letter you make no reference to this letter of March 15th and the failure to get an answer to it?

A. I talked to Mr. Miller on the telephone about about ten days after I wrote the letter.

Q. You talked to Mr. Lee Miller about ten days after the letter of March 15th?

A. About that time, yes.

Q. Then why in the April 15th letter do you say that "Word has come to us that Hunt's will be on a supply bulletin and some other concern will be handling the matter"?

A. When I wrote the first letter I didn't know anything about the supply bulletin; I didn't know how they were going to do it, whether they were going to take it away and have another jobber or what was going to happen. We found out the supply bulletin was being made up on that second trip between the two letters.

Q. In your telephone conversation with Mr. Miller after this letter of March 15th, can you tell us what was said in that conversation? [167]

A. Generally the basis of that letter, what's in this letter; I asked him about why didn't he answer it.

Q. Can you tell us what was said?

A. No. I talked for five minutes.

Q. You talked for about five minutes?

(Testimony of L. W. Phillips.)

A. Yes, sir.

Q. In this letter of March 15th you refer in the last paragraph:

“This is a serious matter, Hunt’s promises to us, and I can’t believe myself that Hunt’s would just pull the plug without some reason.”

But the next communication you had was by telephone with Mr. Miller about ten days after that letter? A. I believe that’s right, yes, sir.

Q. You didn’t within the ten days make any effort to get in touch with Mr. Miller?

A. I don’t remember that.

Q. In the April 15th letter you don’t make any reference to how long you expected to have this——

The Court: Counsel, this takes an awful long time for you to ask these questions. I can read these letters. I know what is in these letters.

Mr. Cullinan: All right, your Honor.

The Court: If there is no mention of it, there is no mention in the letter. [168]

Mr. Cullinan: I wanted to ask him why the April 15th letter does not discuss the contract idea as the March 15th letter does.

A. We were trying to get on the supply bulletin; that was the basis of that letter.

The Court: I wouldn’t be interested anyhow in the reasons that any witness gives as to why he did something. It is argumentative, unless there is some factual matter involved. It is a dangerous question to ask any witness why he did so.

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): You wanted to get on the supply bulletin for Hunt's?

A. That is what we thought we would have to do if they was going to take it away from us. We were trying to do that, too.

Q. You were content to—I will withdraw that.

Mr. Phillips, some times you mismailed mail to Hunt's, did you not? Sometimes you did mismail mail to Hunt's? A. Well, I don't know.

Q. Well, let me show you our Exhibit S, for example. On Exhibit S you say:

“I am also attaching a duplicate check for \$750 covering the one we apparently mismailed last week.”

There was a check for \$750 which you mismailed to Hunt's?

A. Either didn't make it or apparently mismailed it. They didn't get it. [169]

Mr. Cullinan: Does your Honor wish to take the noon recess?

The Court: How much more have you got of this?

Mr. Cullinan: Well, I have a good deal more with this witness on other phases.

The Court: We will take a recess until 2:15, then.

(Whereupon, a recess was taken until 2:15 p.m. this date.) [169A]

November 29, 1955, at 2:15 P.M.

L. W. PHILLIPS

resumed the stand.

Cross-Examination
(Continued)

By Mr. Cullinan:

Q. Mr. Phillips, referring to Exhibit Y, which is the letter of March 2nd, 1954, in the last paragraph there there is a statement that "such treatment would make anyone want to pay their bill regardless of the fact that they took the account away from us with a written contract in our hands at the time."

What were you referring to when you referred to the written contract?

A. A written—which I thought was a written contract, an agreement, I should have said, that Mr. Flynn sent to the Army and Navy Purchasing Offices.

Q. You are speaking then of the bulletin which is Exhibit 3? A. That's right, sir.

Q. That is the written contract that you referred to in that letter? A. That's the paper there.

Q. That bulletin represented the arrangements between you and Hunt Foods—the bulletin represented that? A. Except the time element.

Q. Now your letter, Exhibit Y, was March 2nd. Now Exhibit Z, which is Mr. Church's letter, is the one—a letter from [170] Church to you dated March 5th is the one saying that he has been trying to get you on the phone. "Please call me Monday so we can

(Testimony of L. W. Phillips.)

discuss your letter of the 2nd." Then your footnote explains that you tried to reach him by telephone and couldn't do so. That is true: you tried to reach Mr. Church on Saturday at Hunt's?

A. If I said in the letter, I did.

Q. The letter says you will be down either Friday or Monday, February 12th or 15th. This is dated March, so I assume that is a typographical error.

A. That's right; it should have been March.

Q. March 12th or 15th. Did you go down shortly thereafter to see Mr. Church about this letter?

A. If I told him I did, I did. I would have to check my plane tickets.

Q. Let me show you Exhibit 8A, which is your letter to Mr. Church dated April 15, 1954, which starts off, "I didn't get in in time Friday p.m. to see you." Does that refresh your recollection as to whether you got down to see him between March 5th and April 15th?

A. I wouldn't know; I would have to check my plane tickets.

The Court: This is in 1954 you are talking about?

Mr. Cullinan: This is after——

The Court: This is in 1954?

Mr. Cullinan: Yes, your Honor. [171]

The Court: I don't see much materiality to all this.

Mr. Cullinan: The materiality is, if your Honor please, we are going to show by some other letters that when he mentions contract in a letter then he

(Testimony of L. W. Phillips.)

can't reach us to talk about it, when we say, "We want to talk to you about this contract you claim," and he doesn't come down.

The Court: What is the importance of all that? There is nothing that happened afterwards that will make any difference as to what arrangement there was made. It was either made or it wasn't.

Mr. Cullinan: But the conduct of the parties will show whether there was or wasn't a contract.

The Court: Well, there was some arrangement; it is just a question of what the nature of the arrangement was. The conduct of the parties at the time and during the performance of an enterprise is of course very important to determine what the parties meant by their contract, but afterwards it makes no difference. I am never impressed in any case by what the lawyers or even the parties argue about afterwards, because that is after the event, and the only way you can determine what happened is what happened at the time.

Mr. Rothert: Unless there is some admission.

The Court: I don't attach very much importance to this business about whether they had meetings or they didn't have meetings afterwards. It is a lot of data that doesn't seem [172] to me to have any great importance in the matter, except what inferences will follow from the discussions about the amount of money owing, and so forth.

Mr. Cullinan: Let me say——

The Court: I'm just trying to see whether we can't in some way shorten this proceeding. It seems

(Testimony of L. W. Phillips.)

to me to be unduly long, because all that is involved is what is the nature of the arrangement that was made so far as the question of liability is concerned.

Mr. Rothert: Yes.

The Court: What was the nature of the arrangement that was made? That is all. No matter what the parties may have said about it afterwards, unless it is in the nature of an admission against interest, wouldn't make any difference, I wouldn't think, unless you have some particular point in mind.

Mr. Cullinan: I had this point, your Honor: just that he didn't claim a contract until a year after the termination, and even then when he did——

The Court: That isn't exactly what you want to say. What you are trying to say, I think, is that he didn't claim the specific contract that is being sued on.

Mr. Rothert: That's right.

The Court: That is, in any writing, he didn't.

Mr. Cullinan: Yes. [173]

Mr. Rothert: Except his letter of March 15th, 1953, I think that is the date, or April 13th; I forget which one it was.

Q. (By Mr. Cullinan): Let me show you, Mr. Phillips, just to shorten this up, Exhibit AC, a letter of April 27, 1954, wherein you state in the middle of the next to the last paragraph that "we certainly would have never thought of upsetting a profitable business unless past records show and statements made by your sales people that we could have the Hunt line as long as we did a job."

(Testimony of L. W. Phillips.)

Was that the understanding: that you would have it as long as you did a job?

A. The understanding is according to my testimony; and if we didn't do a job, of course, we would have no reason for it anyway.

Q. You don't mention a ten-year basis here?

A. No. May I ask you who I wrote that letter to?

Q. Yes. A. Who did I write it to?

Q. Your letter to Mr. Church dated April 27, 1954.

A. Well, the parties that I talked to were either not with the company or had quit. Church didn't have anything to do with it.

Q. You did have discussions with Mr. Church on occasions after the termination, didn't you? [174]

A. Yes, sir.

Q. Down there at Fullerton? A. Yes, sir.

Q. And in any of those discussions—well, first, in each of those discussions Mr. Church was talking to you about how you were going to liquidate the amount owed to Hunt? A. Yes, sir.

Q. In any of those discussions with Mr. Church did you bring up the subject of any damages that you claimed that you might have against Hunt Foods? A. Yes.

Q. You did bring up the question of the amount of damages or a cause of action for damages against Hunt for termination?

A. I mentioned to Mr. Church the fact that we felt it was wrong and that we had been damaged. I never threatened Mr. Church with a suit.

(Testimony of L. W. Phillips.)

Q. But you did discuss with him while you were discussing the amounts owed to Hunt's, you did discuss with him the fact that you thought had a claim for damages against Hunt Foods?

A. I thought we had been damaged; I never mentioned anything about a legal matter at all.

Q. You thought you had been damaged because of the termination of this arrangement?

A. Yes, sir. [175]

Q. And that was some time shortly after the termination, would you say?

A. It was on most every trip that I saw him, and I made it a practice to go down once every couple of months and go over our account with him and try to pay what we could, and on every occasion I mentioned the fact.

Q. You went down in May of 1953, didn't you, to see Mr. Church?

A. Well, I would have to check my plane fares or the correspondence.

Q. The termination was in the latter part of April? A. Yes.

Q. Did you go down to see Mr. Church within four weeks after that, would you say?

A. I believe I did. I again would have to check my plane fares that I make out, or the correspondence; I am not able to say now.

The Court: Church was down south?

Mr. Rothert: Yes.

Mr. Cullinan: Mr. Church was at Fullerton, yes.

Q. As a result of these conferences with Mr.

(Testimony of L. W. Phillips.)

Church the establishment of the trade acceptances was worked out? A. Yes, sir.

Q. Going back for just a moment. At the time that the arrangement was worked out initially with Hunt's back in '51, [176] was there any discussion with anyone in Hunt's as to what would happen in the event that you were to die and who would carry on if you were to die? A. No discussion.

Q. Was there any minimum number of purchases that was established; that you would have to purchase any minimum amount of canned goods?

A. None.

Q. You were not required to purchase any particular number of canned goods? A. No, sir.

Q. In February of 1953, you suffered a fire loss, didn't you, in your warehouse?

A. We suffered a fire, yes, sir.

Q. And a good deal of your inventory was burned up in that fire?

A. Yes, sir, but covered by insurance, most of it.

Q. But you didn't recover the whole amount?

A. No.

Q. In insurance? A. No.

Q. In fact, you suffered about a \$10,000 loss in that fire in inventory, didn't you?

A. With the inventory and loss of profits and volume in business—I couldn't estimate; the auditor would have to do [177] that for me.

Q. Can you tell us how much insurance you recovered? A. Approximately \$19,000.

(Testimony of L. W. Phillips.)

Q. What was the name of that insurance company? A. I don't remember that.

Q. This fire loss cut down the efficiency of your doing business, didn't it?

A. Let me——

You are talking about the selling—the operation of selling?

Q. Well, the operation of your business.

A. It would cut down the carrying on of other than selling if we had any, but we didn't have but very little; it wouldn't hurt us any.

Q. It put a crimp in your business, didn't it?

A. I wouldn't say it did. You mean it hurt our business volume or the way we were doing business?

Q. Yes; it prevented you from making profits that you might otherwise make in the business?

A. Well, not as far as Hunt was concerned, because we just kept selling and they delivered.

Q. Well, I am just asking you about your profits in your business in '53. This fire affected the profits in your business, didn't it?

A. Probably some. [178]

Q. As a matter of fact in Exhibits I, J and M you so reported to Hunt's, didn't you?

A. We did what?

Mr. Rothert: I will ask that the witness be shown the exhibits. The exhibits speak for themselves. Exhibits I, J and M?

Mr. Cullinan: Yes.

Mr. Rothert: Can you tell me what dates those are?

Mr. Cullinan: June 1st, '53.

(Testimony of L. W. Phillips.)

Q. In the middle paragraph of that letter you refer to Mr. Liholm's withdrawal of a sum of money.

A. Yes, sir.

Q. "And that coupled with the fire plus the fact that Hunt's suddenly took the account away from us after working at it for a period of two years and letting our other business go down, we found ourselves without a volume to speak of up to a few weeks ago."

So the fire had an effect on your business?

A. No; the volume to speak of in that letter up to a few weeks ago was the business we didn't have when Hunt's quit, I suppose, or something there. The fire of course affected it a little bit but nothing of consequence. We still operated; we still sold merchandise.

Q. I will leave that for a moment.

Now, Mr. Liholm, who is one of the plaintiffs in this [179] action, withdrew \$5,000 of partnership funds in May of 1953?

A. Yes, sir.

Q. And that withdrawal was a surprise to you, wasn't it?

Mr. Rothert: Your Honor, I think this is incompetent, irrelevant and immaterial and beyond the scope of the direct.

The Court: I don't see—

Mr. Cullinan: If your Honor please, he has testified that his business went down in 1953 after the termination. He testified that that was because he no longer had the Hunt account. Now, we want to show that during '53 he had a fire which caused some

(Testimony of L. W. Phillips.)

\$10,000 worth of damage to the business, and Mr. Liholm surreptitiously withdrew \$5,000 from the partnership funds, none of which has been repaid, and in some of the exhibits here he states that that withdrawal of \$5,000 put him in an embarrassing position.

The Court: Assuming that is true, what has that go to do with this case? [180]

Mr. Cullinan: Well, it bears on if he suffered any loss in 1953 after the termination, what was the cause of the loss? Was it because of losing the Hunt account? Because of the fire?

The Court: You mean on the question of damages? Is that what you are speaking of?

Mr. Rothert: I suppose it would relate to that, if anything.

Mr. Cullinan: Yes, that is what it relates to. If there were any damages in 1953 it was because of the termination of the Hunt arrangement.

The Court: I thought you were going to reserve that until the damage testimony was put in.

Mr. Rothert: It is in the letters and I can understand——

Mr. Cullinan: That is right, your Honor. That should come under the head of damages.

The Court: I think probably I made a mistake in not requiring Counsel to finish the direct examination first, because this is becoming quite lengthy. However, we will do the best we can.

Q. (By Mr. Cullinan): Mr. Phillips, in paragraph 5 of your complaint you inform the defendant

(Testimony of L. W. Phillips.)

that you were going to release certain capital funds once you took over the Hunt arrangement. Can you tell us when and who you told that you were going to release this \$10,000 of capital funds? [181]

A. Do I remember who I told?

Q. Yes. A. What did you say?

Q. The complaint, paragraph 5, says at the time you entered into this arrangement with Hunt's, that you informed them that you were going to release certain capital funds from your business, withdraw it. To whom did you say that you were going to release such capital funds?

A. Well, that would be in my original story to Mr. Flynn probably is what that applies to. Capital funds or credit arrangements that we had with Overseas so they could use the money for something else.

Q. You testified that you told Mr. Flynn that you were going to withdraw some capital funds from your business.

A. I probably told Mr. Flynn, of which we have testified to previous to this time, that we probably wouldn't need the capital funds, that we had arrangements to get under this arrangement; if we lowered our business, we would not need the capital.

Q. But you did not tell Mr. Flynn that you were going to release certain capital funds?

A. No specific amount, I don't believe.

Q. What amount of capital funds did you plan to release at that time? Any?

A. We couldn't tell. [182]

(Testimony of L. W. Phillips.)

Q. Did you release any of your capital funds during the time of your arrangement with Hunt's?

A. Yes.

Q. How much?

A. The record shows, I believe, \$12,000 from late 1952 to early 1953.

Q. Your complaint alleges \$10,000. Are you correcting that to \$12,000?

A. The record shows we were probably wrong——

Q. To whom did you release these capital funds?

A. Overseas Finance and Trading.

Q. That is your limited partner?

A. Yes, sir.

Q. Did you give back to Overseas \$10,000 of the capital they placed in the business?

A. We gave them \$10,000 worth of stuff. I don't know how it was applied. We gave them back \$10,000 over a period of six months.

Q. Was that paid for by check?

A. Yes, sir, in small amounts.

Q. A series of checks? A. Yes, sir.

Q. Have you located those checks? A. No.

Q. Isn't it a fact that the \$10,000 or \$12,000 was a loan [183] from you to Overseas?

A. I posted it that way in our books, in our checks.

Q. Your books show that this \$10,000 or \$12,000, whichever it is, was a loan to Overseas?

A. I put in on the check. Each one I paid I would say a loan, and I did that for reasons——

Q. We will get to that in a moment. I just

(Testimony of L. W. Phillips.)

wanted to establish the fact that it is carried on your books as a loan to Overseas.

A. I don't know about being carried on our books. I am only saying what was on the check.

Q. You drew the check?

A. A girl wrote them, I signed them.

Q. Those were delivered to Overseas, your limited partner? A. That is right.

Q. And those checks were marked "Loan"?

A. I believe most of them were, yes.

Q. At the time that you made these loans to Overseas, was the particular amount of money needed in your business to carry out your obligations under the Hunt arrangement?

A. The money that we had—the \$10,000 was the capital anyway. You know really it was in the capital investment stage, and our business was better at the end of 1952 when we started this, and looked pretty good for 1953, that is why I released the money. [184]

Q. I thought you said the money was released starting early in 1952. A. Late 1952.

Q. Late 1952? A. Late 1952.

Q. Late 1952? A. Yes, sir.

Q. And over what period of time did that release of money to Overseas take place?

A. I would have to see the record.

Q. During your time with Hunt's, your other business—you have already testified but I forget what the answer is—was that a brokerage type of business chiefly?

(Testimony of L. W. Phillips.)

A. No, our present business, when we had Hunt's, other than Hunt's was bidding in volume.

Q. Bidding. A. Yes, sir.

Q. In the bidding business do you get commissions?

A. No, we accrue our profits for buying and selling.

Q. Commission earning on brokerage?

A. Yes, sir.

Q. Did your brokerage business increase? Did you add to your brokerage business during the year 1952 when you were on the Hunt arrangement?

A. I would have to look at the books and see. During that [185] year we hired a fellow, I believe, to sell, handle the brokerage end of our business—in other words, do the selling. I wouldn't be able to say it increased or what happened to it. I didn't pay much attention to it.

Q. Isn't it a fact in the year 1952 your brokerage income increased substantially over previous years?

A. The previous year we wouldn't have any. Very little. So anything would have been an increase.

Q. At the time you took on the Hunt account, as I understand your testimony, you planned that you would have to sell some items below cost to you?

A. Depends on how the statement "below cost" is meant. Do you mean below our dollar cost?

Q. Well, below the cost.

A. Of doing business?

(Testimony of L. W. Phillips.)

Q. Below the cost of the goods to you.

A. Well, that is below the cost of his doing business, and in rare instances we sold merchandise a fraction under cost because it may go up from the time I took the order to the time Hunt gave us another price list. It may have advanced a few cents a case. It may show a 30 or 40 cent loss on that item. That was beyond our control. The cost factor we talk about is the cost of doing business, selling.

Q. On occasions you sold below that cost in order to get the goods on the shelves of the commissaries? [186]

A. No, not in order to get the goods on the shelves, of the commissary stores. We would send them a list, and it was possible, we found in looking the invoices over, that the price may go up a fraction, and if it did, we would naturally show that 20 cents a case loss, 5 cents a case loss, or whatever the advance was.

Q. Page 13 of your deposition, lines 2 to 4, where you are testifying about your conversation with Mr. Flynn in September, 1951, this appears:

“I also stated that we would have to also sell merchandise at a lower figure in some instances to get in and keep competition out, and he understood that.”

A. Yes, sir, that is right. The lower figure didn't mention the cost factor. A lower figure means a lower than normally with a profit.

Q. There were times when you sold below cost

(Testimony of L. W. Phillips.)

at these commissaries in order to get the line into the commissary, isn't that so?

A. No, sir, the Hunt Food line was never in that position. It was always under anyone. We never had to go below cost to sell it, no. No, we would not have to go below cost to sell it.

Q. Did you never sell below cost?

A. We sold below cost under the conditions which I explained. [187] We never intentionally sold anything below our cost. If we gave the commissary officer a price today on our trip, and before we got back with the order and got it through the price went up ten cents a case, we might have lost the ten cents a case. That was possible, and I see that we did it in rare instances.

Q. Didn't you have the order from the commissary first before you ordered from Hunt's?

A. No. How is that again?

Q. Didn't you have the commissary order before you ordered from Hunt's?

A. That was the trouble. If I had it the other way, it would have been all right. I took it the other way. I ordered and the price went up.

Q. There would be times when Hunt's price to you would be higher than you had agreed to sell to the commissary?

A. That is right.

Q. You called on these commissaries on the average of about once a month.

The Court: Counsel, I have listened to this patiently now for a long time. I cannot see the relevancy of the manner in which the plaintiff con-

(Testimony of L. W. Phillips.)

ducted the business with the commissaries. It could have been good, bad or indifferent. He could have been a scamp. He may have had associations with the most villainous type of people. It has nothing to do with the [188] case. The only question is what kind of agreement did they have. Apparently from what you presented so far in the case there never was any complaint about the plaintiff's manner of doing business, except that he did not pay for his merchandise as promptly as they thought he should have, but there was never any complaint about the amount of business he did for your clients, and whether he was a good man, indifferent man, or whether you didn't like him, or whether he had a fire or something else, those are matters that do not color my point of view. Lawyers like to lug in a lot of these things. The only question in these cases, if you would get down to them, is what the terms of this agreement were from your point of view, and then the next question is, if whatever agreement there was was breached by the defendant, the amount of damages. I am not venturing any opinion on that subject, but I just do not see any point in whether he sold this merchandise under cost, how many times he called on the commissaries—there are a couple of letters in evidence that indicate he increased the volume and he was doing a good business. He may not have been paying for it. That may be a breach of the contract. But this other stuff—what is the relevancy of it? An awful lot of it is here in the record. Maybe I have not made

(Testimony of L. W. Phillips.)

myself clear, but I do not see the competency of these matters that are being gone into—as much so on the part of the [189] plaintiff as on the part of the defendant. Everybody wants to paint the other fellow as black as the ace of spades. I do not care what color they are. All I want to get is the facts. If you gentlemen will present all the facts that have to do with the contract, if there was one, and the nature of it, we will get along. There was some sort of arrangement between the parties. That is obvious. I am just saying this now to see if we can't—what should have been done in a pretrial conference—get down to the real issue of the case. There was some sort of arrangement between the parties and it went on for some period of time. It must have been governed by some arrangement between the parties, and at a certain time it was terminated by the defendant. Now, maybe there was a right to terminate it, maybe there was not. I do not know. Maybe it was an agreement for a specific period of time, maybe there was no time specified. But certainly there was some arrangement made that was going to continue for some time. It was not to be made today and to end within a few hours, because the defendant himself notified commissaries that the plaintiff was going to conduct these arrangements with them. So maybe it is one of those cases where, if there was no time specified, it was a reasonable time. But there must have been something about the arrangement. That is what I was

(Testimony of L. W. Phillips.)

hoping you would get to, so we could get at it. But so much of this examination, both [190] by the plaintiff and by the defendant, is on immaterial matters.

I think I am correct in what I have said, counsel, that there was some kind of arrangement made, and it existed for some time. It just did not spring out of the ground like Pegasus and have neither a wing nor a body to it. It had something to it. You dispute the fact that it was an agreement and that it was not for a specific length of time. You say, as I understand from your opening statement, it was some agreement terminable at will, but it must have had some period of time to it in order to be terminable at will. What was the understanding of the parties? In order to do justice in this case, that is the issue that I think ought to be gotten at. I am not going to prescribe or proscribe your examination in any way because I do not know as much about this case as you do or as your opponent does. All I am indicating is that there is so much irrelevancy in it so far it is hard for me to keep my mind on the res. I do not want to get off on these side issues.

See if you can get more closely to the issue.

Mr. Cullinan: Of course, your Honor will understand so far as the defendant is concerned, when we deny that there was any conversation or contract such as has been testified to, and you cross-examine the plaintiff, you can't very well establish—— [191]

The Court: I realize that, but you have got off on a line of things with all these letters.

(Testimony of L. W. Phillips.)

Q. (By Mr. Cullinan): Mr. Phillips, in your direct examination you stated that your travel was the main cost of your business, did you?

A. In the Hunt selling, traveling and book-keeping.

Q. And you traveled in connection with your other business as well as for the business done by Hunt's? A. No.

Q. You did not travel for any other business?

A. Very little. Most of that came in the mail or by phone.

Q. There was no brokerage business that required you to travel?

A. I didn't handle that.

Q. I mean it was part of your expense, to travel? A. Yes, that is right.

Mr. Cullinan: No further questions.

Redirect Examination

By Mr. Rothert:

Q. I think on cross-examination, Mr. Phillips, you testified that in one question and answer the invoices stated that you were——

Mr. Cullinan: Excuse me, your Honor. May I have it clarified? Are we going into redirect on a portion of the testimony.

Mr. Rothert: That is what I had in mind. [192]

The Court: I do not know, counsel.

Mr. Rothert: At this point I was intending to

(Testimony of L. W. Phillips.)

have a few questions on redirect on a portion on which he was cross-examined.

The Court: Do you have much?

Mr. Rothert: No.

The Court: All right.

Mr. Rothert: Not many questions.

Q. On cross-examination in response to one of the questions you answered that the invoices were payable in ten days. I will ask you to take a look at the invoice, which happens to be one dated February 10th, 1953, to Wellington Phillips Company on the invoice heading of Hunt Foods, where it says, "Ship to Castle Air Force Base." On the face of that it says: "Contract dated 2/10/53. Terms 2% ten days." The invoices you got on all of this Hunt's business, was there more than one stated terms? Were they all the same or were there various different terms on your invoices?

A. Most of them said 2% ten days, which if we paid it, we got out 2%.

Q. You say most of them. Do you mean 51%, 99%—

Mr. Cullinan: If your Honor please, the witness has not established that he is one who can tell what percentage.

Q. (By Mr. Rothert): To what extent have you examined the invoices of the Wellington Phillips Company received [193] from Hunt Foods between October 1st, 1951, and the present time?

A. That feature I have not looked at very closely, Mr. Rothert.

(Testimony of L. W. Phillips.)

The Court: Is that a printed form or is that typed?

Mr. Rothert: No, that is typed on, that part, the terms.

Q. In answering a question about the assignment of the accounts receivable, you said it proved to be erroneous, and then did you refer to what you later stated, that the first two items on the list of accounts had not been received by you?

A. That is right.

Q. Is that the area you referred to?

A. That is right.

Q. In other respects it was correct?

A. Yes.

Q. There has been some reference to trade acceptances which you signed in 1953. A. 1953.

Q. Was the money owed to Hunt's evidence by those trade acceptances on the same Hunt invoices as were covered in 1952 by the assignment of the accounts receivable? A. No, sir.

Q. I show you Defendants' Exhibit K. This is dated June 17, 1953, and refers to some pumpkin, fancy grade. The last [194] sentence says, "The above worth is about \$9,000." The "above worth," is that referring to the value of the pumpkin?

A. Yes, sir.

Q. Do you mean that is the market?

A. That was the market at the time I wrote that letter.

Q. Defendant's Exhibit T, letter dated October 5th, 1953, has attached to it a photostatic copy of

(Testimony of L. W. Phillips.)

United States Navy Purchasing Office award supply contract. I think you identified that as an open end contract in your cross-examination?

A. Yes, sir.

Q. Was that order filled or consummated?

A. Completely? In full?

Q. Either completely or to some extent.

A. In part.

Q. What is an open end contract?

A. It means they can draw if they wish, and if they don't wish they don't have to. It is drawn by the ships and shore. It is made for a three months period for the Navy to draw at their discretion.

Q. You commit yourself to deliver?

A. Yes, sir.

Q. And they withdrew——

A. If they want to. You are supposed to know how much they want, though. [195]

Q. Do you know how much the Navy drew on that particular open end contract?

A. I wouldn't be able to say. 25,000 pounds—\$25,000 worth, I think.

Q. This appears to have a total of 105,175, it states.

A. \$25,000 is what they drew, as a round figure.

Q. On Defendant's Exhibit AK is a hand-written P.S.: "We have \$86,000 worth of turkey orders to the commissary stores for delivery before November 16th. This should help us clean you up pretty well before your November closing." The letter is dated September 8th, 1954. What kind of

(Testimony of L. W. Phillips.)

an order for those turkeys was that particular order that is referred to in your note?

A. That was both open end and firm orders. Some we filled, some we could not, due to credit.

Q. To what extent did you fill the orders which this note purports to be in the amount of \$80,000?

Mr. Cullinan: Just a minute.

The Court: I do not see the relevancy of this. What has this got to do with the case? Of course, the letter is in evidence. You put it in. But what is the importance whether or not some account that he referred to that might be a means of paying an acceptance, what has that got to do with the case?

Mr. Rothert: As your Honor indicated, of course, the letter is in evidence, and I thought two or three points in the letter might require explanation.

The Court: I do not mean to be facetious about it. The explanation might be interesting, but I do not know why it is material.

Mr. Rothert: I assume the letter is introduced for possible admissions by Mr. Phillips that his business was really booming during that period after the termination of the Hunt account.

The Court: That would hardly follow from the long list of letters in which there is a constant request for payment and explanations made as to how soon payment could be made, and so forth. There is a long list of that, which I assume counsel has offered for the purpose of pointing up his argument or statement that it was inconsistent with the idea that Phillips had a claim against the Hunt people

(Testimony of L. W. Phillips.)

for breach of the agreement, but the details of that I see no reason for going into.

Q. (By Mr. Rothert): You were asked if you ever got a letter in reply to your letter of March 15th, 1953, to Mr. Miller, which is Plaintiffs' Exhibit 6, and you said no. Did you get a reply to your letter of April 15th, 1953, to Mr. Miller?

A. No, sir.

Q. Do you recall ever getting a reply to any letter that [197] you wrote to Mr. Miller's attention?

A. No, sir.

Q. You said that after the March 15th, 1953, letter, Plaintiffs' Exhibit 6, which is the first of the two letters that you referred to rumors that you heard that you were going to lose the Hunt account, you said that you wrote the letter, and then I think you said about ten days later talked to Mr. Miller on the phone?

A. Yes, sir.

Q. And when you were asked what the conversation was, you said you could not say what was said. Do you have any recollection at all of anything that was said in that phone conversation?

A. We talked for five minutes. We talked about this matter of cutting off——

Q. I didn't ask you how long you talked. Do you remember anything you said or anything Mr. Miller said?

A. I asked Mr. Miller what the trouble was and why we were being taken, what was happening, or why we were not notified or given some information on it to tell us the reason why. He said it was out of his hands. That was the gist of the conversation.

(Testimony of L. W. Phillips.)

I don't remember anything else that was said. About that time I was pretty excited about it.

Q. Did you continue to sell Hunt's merchandise after that? A. Yes, sir. [198]

Q. Do you recall anything else that was said in that conversation on the telephone?

A. I asked Mr. Miller what he knew about it. He said he didn't know anything. It was out of his hands.

The Court: He has already covered that. It is getting repetitious now.

Mr. Rothert: I didn't know just what he meant by out of his hands, and I didn't want to lead him into anything, your Honor.

I have no further questions.

The Court: Will you continue to complete the examination of the plaintiff, whatever you have to ask on damages or any other phase of the matter, so we can get through with his testimony at some time or other.

Q. (By Mr. Rothert): Mr. Phillips, where did you put the Alameda Air Force Bases?

A. They are under the rubber band.

The Court: Suppose you get your material organized. We will take a five-minute recess.

(Recess.) [199]

Mr. Cullinan: If your Honor please, before we get into the question of damages, not to upset the decorum, I have a witness who has to leave for

Phoenix tomorrow. He will be a very short witness, less than five minutes, if we could just put him on out of order.

The Court: Certainly.

Mr. Rothert: I have no objection.

W. J. REID

called as a witness on behalf of defendant, out of order; sworn.

The Clerk: Please state your name to the Court.

The Witness: W. J. Reid.

The Clerk: Please spell you last name?

The Witness: R-e-i-d.

Direct Examination

By Mr. Cullinan:

Q. Mr. Reid, in 1951, were you employed by Hunt's Foods at Fullerton, California?

A. Yes, sir.

Q. You are no longer with the company?

A. No, sir.

Q. And in 1951, you were the export and government supply manager of Hunt Foods?

A. Yes, sir.

Q. In August of 1951, did Mr. Phillips come to see you?

A. I am not positive of the date, but I believe so, yes. [200]

Q. Had you asked him to come or had he asked to see you? A. He asked to see me.

Q. What was the purpose of the meeting?

Mr. Rothert: I will object to that on the ground

(Testimony of W. J. Reid.)

that calls for a conclusion and opinion of the witness.

The Court: Yes.

Q. (By Mr. Cullinan): What was said at the meeting between you and Mr. Phillips? First, was anyone else present?

A. I am not sure whether or not Mr. Miller was present or not. Usually Mr. Miller was asked to join any conversations that Mr. Phillips and I had whenever Mr. Phillips visited Fullerton.

Q. Coming back to this date, what was said at this meeting? A. In general?

Q. Yes.

A. Well, in general, it was Mr. Phillips' intention to obtain an agreement or an arrangement to represent us in the military trade in Northern California.

Q. As a broker or jobber or in what capacity?

Mr. Rothert: You are still limiting it to what was said? Your question refers to what was said?

Q. (By Mr. Cullinan): What said said, as near as you can remember, at that meeting?

A. Well, his intention, as I said before, was to obtain an agreement from Hunt for him to proceed in representing Hunt [201] to the military commissaries and other agreeable military outlets in Northern California.

Q. What did he say? Do you remember what he said and what you said at that meeting?

A. Well, specifically I can't tell you the exact conversation; but in general, his intentions were

(Testimony of W. J. Reid.)

voiced and we tried to arrive at an agreement for him to proceed.

Q. Anything said at that conversation about any period of time that he might be considered as a representative of some sort of Hunt's?

A. You mean the duration of the agreement?

Q. Yes.

A. I believe not. In fact, I am sure not.

Q. Did he ask you in that conversation for any ten year contract? A. No.

Q. Did Hunt Foods at that time enter into ten year contracts?

Mr. Rothert: I will object on the ground it is calling for the conclusion and opinion of the witness.

The Court: Yes. Sustained.

Q. (By Mr. Cullinan): Was anything else said at that meeting that you remember?

A. Well, the final agreement, as I recall it, was arranged that Mr. Phillips would act as a jobber rather than a representative, and under such arrangement he would buy merchandise [202] from Hunt Foods and resell to the commissaries.

Q. In your conversations with him there was no discussion about a length of time that he would so act?

Mr. Rothert: That has been asked and answered and it is a leading question.

The Court: Yes, he has already said there was no duration discussed.

Mr. Cullinan: That is all.

(Testimony of W. J. Reid.)

Cross-Examination

By Mr. Rothert:

Q. Mr. Reid, where were you when this conversation took place? A. In Fullerton.

Q. I mean in whose office? A. In my office.

Q. Your title then was manager of the export and government supply department?

A. Yes, sir.

Q. Did your duties include all sales to government purchasers or just overseas export government sales?

A. Well, there was a distinction between my responsibilities excluding the commissary stores, but in general, I had a voice of opinion in all forms of government business.

Q. Was Mr. Flynn, the district manager at Hayward, California, under your jurisdiction in the chain of command in the company? [203]

A. No, sir.

Q. He was under Mr. Miller, was he?

A. Yes.

Q. Was Mr. Miller the sales manager for all district sales of Hunt Foods? A. Yes, sir.

Q. District sales are districts in the United States but not export or overseas; is that true?

A. We had a district in Hawaii which could be considered overseas.

Q. Was that district under Mr. Miller?

A. No, it was under mine.

Q. Under yours. Did you just have one conver-

(Testimony of W. J. Reid.)

sation with Mr. Phillips that you can remember in 1951? A. No, I believe we had several.

Q. Didn't Mr. Phillips in the later summer of 1951 contact you and ask you if his company could handle Hunt's sales to overseas governmental military installations? A. Yes, he did.

Q. Was that discussed in the same meeting you are referring to in your direct testimony?

A. I believe so, yes, if I am thinking of the same meeting.

Q. Well, was that matter of sales to overseas military purchasers the subject of discussion in other meetings than the one you referred to on direct testimony? [204]

A. Yes, sir, I believe so.

Q. No arrangement was ever made with Mr. Phillips about sales overseas?

A. None that I know of.

Q. I think you said you are not sure whether Mr. Miller was present or not.

A. Mr. Miller was present in some of the discussions and in others I remember he was not available.

Q. You were asked on direct examination whether there was a meeting in August of 1951; you said you weren't too sure it was August, but you remembered a meeting.

A. I remember several meetings. [205]

Q. This testimony you gave on direct examination, where those statements made in several meetings or in just one meeting?

(Testimony of W. J. Reid.)

A. Well, the agreement was the culmination of several meetings.

Q. When you say the agreement, you are speaking of the culmination of a series of discussions?

A. Yes, sir.

Q. When was the last of the series of discussions?

A. As best I can recall, it was in the summer of '51.

Q. Will you give us your best estimate as to what time, June, July, August, September, October, November or December?

A. I am not sure. The month of August was mentioned in this so I presume that there is some bearing.

Q. If the month of August had not been mentioned to you here in court today, what would you have said was the time of that meeting?

A. I couldn't swear to what time.

Q. Did you know Mr. Phillips before; that is, prior to the summer of 1951?

A. I believe I did, yes. I knew him before he started calling on us in Fullerton.

Q. Did you at one time introduce him to Mr. Miller?

A. Yes, sir.

Q. When you introduced him to Mr. Miller did he tell you that he wanted to talk to Mr. Miller about some Hunt business? [206]

A. I am not positive of this, but I believe that I suggested that Mr. Miller be in on the conversations because it was business conducted within one

(Testimony of W. J. Reid.)

of his districts and therefore it was his responsibility, so I introduced him.

Q. I think you mentioned that military sales in Northern California was one of the phases discussed in this conversation. A. Yes, sir.

Q. Did you know that the Hunt Company salesmen had been handling sales to the military bases in Northern California at that time?

A. Yes, sir.

Q. Was there any mention in this particular conversation, these conversations you referred to, as to what price basis the Hunt products would be sold to Mr. Phillips?

A. The price sold to Mr. Phillips for the military?

Q. Yes.

A. I don't remember any specific conversations on that subject, no, other than the price prevailing at that time.

Q. You mean the prevailing jobber prices?

A. Yes, sir.

Q. Were you familiar with the prices at which Hunt salesmen were then selling the products to the military bases?

A. Familiar to the extent that I received copies of all price lists issued. [207]

Q. Was there any mention in these conversations that you say you sat in on that Mr. Phillips had discussed these matters with Mr. Flynn in Hayward?

A. Yes, I did recall that he mentioned that he

(Testimony of W. J. Reid.)

had discussed it with Mr. Flynn in Hayward and that Mr. Flynn had sent him to Fullerton to discuss it with me, and in turn I referred him to Mr. Miller but still stayed in on the conversations.

The Court: Why would Mr. Flynn have sent him to see if you had charge of the overseas division? I don't quite understand that.

A. Well, the subject of representing Hunt at that time included more of the domestic sales to the commissaries which had previously been solicited by Mr. Flynn's salesmen, and also included the subject of overseas business, which was strictly under my control.

Q. Wouldn't it have been more reasonable that he would have sent him to see Mr. Miller, who was the head of the domestic business?

A. I am not so sure of that, your Honor. It was known within the company and within the key personnel that I was in charge of the Government business, and as long as the overseas business was a part of the conversation, Mr. Flynn sent him to see me.

Q. Did you have charge of the Government business within [208] this particular district?

A. Certain types of military business I handled domestically as well as overseas.

Q. You mean this buying and selling to commissaries, was that——

A. Not particularly the commissaries; subsistence purchases.

Q. That was within Mr. Miller's jurisdiction?

A. Yes, sir.

(Testimony of W. J. Reid.)

Q. In this discussion with respect to Mr. Phillips undertaking to act as a jobber in dealing with the commissaries was really a matter that Mr. Miller would be more apt to be interested in?

A. Yes, sir. That was the reason I introduced them and expedited the meeting.

Q. Mr. Phillips has said on the witness stand that he went down there to see Mr. Miller because Flynn told him to go down and see Miller. Did Phillips tell you that Flynn had sent him down to see you?

A. That was my understanding, yes, sir.

Q. That was your understanding?

A. Yes.

The Court: All right; go ahead.

Q. (By Mr. Rothert): I will ask you if when Mr. Phillips came in to see you he didn't tell you that he wanted to talk to Mr. Miller and asked you to introduce him to Mr. Miller? [209]

A. As near as I can recall, that is my recollection. Mr. Phillips and I knew each other, and he came in to see me, and the conversation was started, and as soon as I understood the text of his intentions, I——

The Court: That isn't exactly what he asked you. He wanted to know whether it was your recollection that Mr. Phillips had asked you to take him in and introduce him to Mr. Miller. He wants to know whether that was so.

A. I wouldn't care to testify to that, your Honor.

(Testimony of W. J. Reid.)

Mr. Rothert: To make it more complete——

The Court: What?

A. I wouldn't care to testify to that because I am not positive.

Q. You don't recall? A. No, sir.

Q. (By Mr. Rothert): I show you a copy of a letter dated October 2, 1953, a photostatic copy of an original, and ask you if you can recall receiving that letter from Mr. Phillips?

The Court: What was the date of that letter?

Mr. Rothert: October 2nd; I said '53; I meant '51, your Honor. I misled you.

The Court: That letter has not been marked in evidence?

Mr. Rothert: Pardon me?

The Court: That letter has not been marked in evidence?

Mr. Rothert: I don't believe it has, your Honor. [210]

The Court: It was referred to by the defendant but not marked in evidence.

A. Yes, sir, I think I do remember this letter.

Mr. Rothert: May I offer it as Plaintiff's Exhibit next in order and have it marked?

(Whereupon, photostatic copy of letter referred to above was marked Plaintiff's Exhibit No. 9 in evidence.)

Q. (By Mr. Rothert): Now, Mr. Reed, I will ask some questions about the letter but I want to clear up another point first. You say that in your

(Testimony of W. J. Reid.)

capacity at that time there was certain government business in Northern California that came under your jurisdiction? A. Yes, sir.

Q. Wouldn't that be the government business that was purchased primarily for use overseas or at overseas bases or on ships that would be leaving the country?

A. The end use might turn out that way. However, the business that I was referring to in Northern California was subsistence purchases made by the Oakland Quartermaster, Navy Purchasing Office, and Army and Air Force Exchange Service.

Q. On the so-called bidding basis where people bid to the government to sell subsistence foods and other items for troop use? [211]

A. Yes, sir.

Q. That type of business was not at that time under Mr. Flynn's authority or supervision as district sales manager, was it?

A. No, sir. In addition to the subsistence, overseas resale business was under my jurisdiction.

Q. The sales to the commissary stores located on the Army, Navy and other military bases in Northern California would be regular sales under Mr. Flynn's jurisdiction? A. Yes, sir.

Q. And under Mr. Miller's higher authority and supervision and not under yours?

A. Although I repeat what I tried to explain earlier; my opinion was usually asked in any instances of change. Now, I might explain that Hunt

(Testimony of W. J. Reid.)

Foods was a rather young company at that time insofar as their management and departments, and overlapping of responsibilities was sometimes present. Therefore, my opinion was asked on commissary business.

Q. You mean, don't you, that your opinion was often asked but there wasn't any doubt about where your jurisdiction started and ended?

The Court: That is a little bit on the argumentative side.

Mr. Rothert: I think it is, your Honor.

Q. Now, this letter I have shown you of October 2, 1951, [212] isn't it true that the matters referred to in that letter had to do with the government business under your jurisdiction, namely, sales for subsistence use or for resale in overseas use by the military?

A. Yes, sir.

Q. And weren't there times when Mr. Phillips talked to you alone when neither Mr. Miller nor anyone else from the Hunt Foods Company was present and talked to you about arrangements with Hunt Foods for that type of sales that came under your jurisdiction, as a broker?

A. Yes, he did talk to me on that basis.

Q. And on this occasion that you say you remember introducing him to Mr. Miller and Mr. Miller was in on part of the conversation, in that very same occasion Mr. Phillips talked to you about this overseas subsistence government business, too, didn't he?

(Testimony of W. J. Reid.)

A. On the day that I introduced him to Mr. Miller?

Q. Yes.

A. I couldn't recall positively, but I would imagine so.

Q. My recollection is that you said that when it appeared to you that what Mr. Phillips was talking about would involve Mr. Miller's scope of authority, then you thought Mr. Miller ought to get in on it?

A. Yes, sir. That was referring to the commissary business.

Q. Yes. On that particular conversation did Mr. Miller [213] remain in your office and talk to Mr. Phillips or did they leave your office at some time together, that is, did the two of them leave and leave you?

A. I don't believe they did leave.

Q. No arrangement was made with Mr. Phillips with respect to the overseas or subsistence type of government sales?

A. No, sir.

Q. What business are you in now, Mr. Reed?

A. I am with Granny Goose Foods.

Q. Now, in any of these conversations that you had at which you were present with Mr. Phillips, do you recall anything being said by Mr. Phillips that if he took on the sales to the commissary stores in Northern California it would be an unprofitable matter for him for a period of time because prices on the Hunt products were already established with the commissary bases and it would be some time

(Testimony of W. J. Reid.)

before he could create a margin of profit for himself.

Mr. Cullinan: Would you repeat that question? I didn't get it.

The Court: Read it.

(Question read.) [214]

A. I am not sure on that. I believe he might have mentioned something like that, which would be quite normal.

Q. (By Mr. Rothert): You say it would be quite normal. You knew that the Hunt prices at which the products had been sold by the salesmen were substantially the same prices that Hunt was going to sell the products to Mr. Phillips?

A. I didn't mean it in that sense.

Q. Didn't you know that at the time of the discussions?

Mr. Cullinan: He is answering the question.

The Witness: I didn't mean it in that sense. I meant it in a sense whenever anybody starts with a new venture, it is usually unprofitable at the beginning until you get established.

Mr. Rothert: You knew that. Didn't you also know that because of the fact that the price that Mr. Phillips would have to pay for the Hunt products was practically the same as the prices which the commissary bases had been paying for the products, that he could not make a profit until he could increase the price to the commissary stores and create a margin of profit?

(Testimony of W. J. Reid.)

The Court: That is obvious. I do not know why we waste time on that. Of course that is so. I do not have to be convinced about that. The man is going to buy the product of the Hunt Company. He can't make any profit on it unless he can sell it for more than he paid Hunt for it. It doesn't [215] take a Philadelphia lawyer to see that. All that does is to get us into argumentative matters. If you want to ask him what was said in the conversation——

Mr. Rothert: That is what I say. I am more interested in whether he recalls that being discussed. I think I asked him that and he said he thinks something along that line was said.

Q. Do you recall any comments by Mr. Phillips as to the business he was then engaged in, namely the bidding business for military subsistence, purchases?

A. I am not sure that he mentioned it at that time because probably that was assumed, because I knew of his type of business and his specific business before he ever came to Fullerton. I knew that that was a part of his business.

Q. Do you recall any comments being made in those conversations that Mr. Phillips' bidding business was profitable that year? He was making money on it?

A. I don't recall that, no.

No. 15216

United States
Court of Appeals
for the Ninth Circuit

HUNT FOODS, INC., a Corporation,
Appellant,
vs.

WELLINGTON PHILLIPS and H. W. LIHOLM,
Appellees.

Transcript of Record
In Two Volumes

Volume II
(Pages 267 to 542)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

DEC - 3 1956

No. 15216

United States
Court of Appeals
for the Ninth Circuit

HUNT FOODS, INC., a Corporation,

Appellant,

VS.

WELLINGTON PHILLIPS and H. W. LIHOLM,

Appellees.

Transcript of Record
In Two Volumes

Volume II
(Pages 267 to 542)

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

(Testimony of W. J. Reid.)

Q. Do you recall any statements by Mr. Phillips that because he could not make money on the sales to the commissary for a period of a year or two he would have to have it for a period of time longer than two years, otherwise he didn't want to take it?

A. No, sir, I do not recall that.

Q. Do you recall any statements by Mr. Phillips that in [216] order to handle sales to the commissary stores he would have to give up most of his bidding business because he would have to handle it himself?

A. You are refreshing my memory a little bit now on the bidding business. I believe the conversation was to the effect that the bidding business was less frequent than Mr. Phillips had enjoyed in the past, and that he needed additional lines or additional outlets for his type of military business.

Q. For what type of military business?

A. Well, military business.

Q. Did you ever see a memorandum, an inter-office Hunt Foods Company memorandum issued by Mr. Flynn stating that Mr. Phillips was starting to make the sales to commissary stores in Northern California?

A. To whom was the memorandum addressed?

Mr. Cullinan: If your Honor please, I think we are getting beyond the scope of the direct examination.

The Court: I am inclined to think so. That is already in evidence, anyhow.

(Testimony of W. J. Reid.)

Mr. Cullinan: I do not know that it is.

The Court: Yes, it is attached to the memorandum that was sent to all the commissaries. There is a memorandum that went out with it directed to all the salesmen, that called their attention to the fact that this memorandum [217] was being sent out to the commissaries, and that they would get the credit for any sales on their accounts. I mean, if that is what you are referring to as an inter-office memorandum——

Mr. Rothert: Mr. Miller in his deposition said that he saw an inter-office memorandum, and I asked Counsel if he could produce it for me.

The Court: You are talking about something different.

Mr. Rothert: I do not know whether it is the same thing or not myself.

The Court: The direct examination was merely confined to this meeting with Mr. Phillips.

Q. (By Mr. Rothert): How many times can you remember you talked to Mr. Phillips in Fullerton in which the subject of sales to the commissary stores in Northern California was discussed?

A. A half dozen.

Q. On the last one of those, which you said was the culmination——

A. I didn't say—it wouldn't be the last one. He discussed the subject with me before and after.

Q. I see. Well, there was one meeting which you said was a combination, and in your words, came to an agreement. How many can you remember up to and including that one?

(Testimony of W. J. Reid.)

A. Three or four. [218]

Q. After that there were some other discussions?

A. Yes, sir.

Q. About the same subject?

A. Yes, sir, same general subject.

Q. Was Mr. Miller present at all of them?

A. No, sir, I wouldn't say that.

The Court: It is not clear to me what you are talking about now. You say there was a meeting at which there was an agreement. I do not know what that means. You leave it up in the air, both sides. Maybe you want to leave it up in the air. I don't know. It is not clear to me. The testimony doesn't mean anything, unless you state what the conversation is that occurred.

The Witness: Are you asking me the question?

The Court: Yes. State what conversation you had on the subject of what arrangements were to be made with Phillips.

The Witness: I thought I made it clear——

The Court: No, you said what it did not contain, that it did not have any duration period to it. Other than that, I do not know what the conversation was.

The Witness: As near as I can recall, it was agreed that Mr. Phillips would be a jobber selling to the commissaries.

The Court: That is all there was?

The Witness: Yes, sir, he would not act as a broker or a [219] representative, it is sometimes called.

(Testimony of W. J. Reid.)

The Court: Then the sum and substance of it is he made these visits down there to you gentlemen and what was finally agreed to was he was to be a jobber selling to the commissaries for Hunt Brothers during that period, is that it? A. Yes.

Q. No other terms or conditions? A. No.

Q. (By Mr. Rothert): Was there anything said about you going back and talking to Mr. Flynn about it? A. I beg your pardon?

Q. In this particular meeting where you say it was agreed that Mr. Phillips would be a jobber, did either you or Mr. Miller tell him to go back and discuss it further with Mr. Flynn?

A. I don't believe so.

The Court: This is a sort of mountain that labored and gave forth a mouse. He went down and had all these discussions with you and all that finally was said was, "Yes, Mr. Phillips, you are going to be the jobber that is going to handle the commissary business"? That is all that came forth?

The Witness: To clarify your thinking, sir, Mr. Phillips' first intention was to act as our broker or representative, to which we did not agree. The final agreement was to make him [220] a jobber.

The Court: Were there any details of this discussed and related to you up here locally with the sales manager here? The details of how it was going to be handled? A. No, sir.

Q. In other words, you were agreeing down there on the general policy?

A. That is right.

(Testimony of W. J. Reid.)

Q. The general policy that Phillips was to be the exclusive jobber and representative of Hunt in connection with sales to the commissary?

A. Yes, sir.

Q. Once that general policy was agreed to, that is as far as you went? A. Yes.

Q. (By Mr. Rothert): The general policy meant that he would not be a broker but would be a jobber? A. Yes.

Mr. Rothert: I have no further question.

Mr. Cullinan: No further question.

The Court: That is all, sir.

L. W. PHILLIPS

resumed the stand; previously sworn.

Direct Examination

(Continued)

By Mr. Rothert:

Q. Mr. Phillips, how many commissaries [221] were there in Northern California during the period of time that you were selling the Hunt line at the commissaries?

The Court: I think he has already testified—19.

A. Yes, sir.

Q. (By Mr. Rothert): Alameda Naval Air Force Base was one of those? A. Yes, sir.

Q. Have you reviewed all of the invoices from Hunt Foods to you for delivery to Alameda Air Force Base, sir, in all the purchase orders from that commissary to you during the period you were selling the Hunt line?

(Testimony of L. W. Phillips.)

A. For twelve months, yes, sir.

Q. At the time you started in December, 1951, were any of Hunt's items being sold at that commissary?

A. We had no record of it.

Q. Did you see any Hunt's items for sale on the shelves?

A. No.

Q. You just said you had no record of it. That is not answering whether or not they sold any.

Mr. Cullinan: I will object, your Honor. It has not been established whether this man knows one way or the other.

Q. (By Mr. Rothert): Did you visit the Air Force commissary stores?

A. Yes. [222]

Q. When did you first call over there after starting out on December 1st, 1951?

A. In the middle of December.

Q. When did you make your first sales to the Alameda commissary?

A. I believe April, 1952.

Q. At the end of the period how many items had you sold to the Alameda commissary?

A. Items and sizes, 55. Don't be confused—items and sizes.

Q. Like if peas are in two different sized cans, that would be two?

A. Yes.

Q. What total amount of sales did you make to that commissary store during that period?

Mr. Cullinan: If your Honor please, I will object to this as incompetent, irrelevant and immaterial as to what volume of sales he had in a particu-

(Testimony of L. W. Phillips.)

lar twelve months' period to one of the commissaries. It won't tell us anything.

The Court: I don't know what the purpose of this is. Will you state your purpose?

Mr. Rothert: Your Honor, he did a certain amount of business. If I can't prove what business he did——

The Court: I am not stopping you from proving it. I just want to find out what is the theory upon which you are proceeding. Counsel is making an objection on the [223] materiality.

Mr. Rothert: I will explain the theory on that. We have selected the Alameda Air Force commissary base as an example. That is, we intend to prove that in the period that he worked on it he sold a certain amount, he made a certain amount of gross profit, he increased the number of items that the commissary would take and sell to a certain number, that there was a certain volume, that the volume averaged so many cases per item and to show the experience that one commissary store had.

Then I intend to prove the progress he made at other commissary stores and the acceptance of the Hunt line at other commissary stores, the figures as to dollar amounts and the gross profit that the Alameda Air Base commissary can be used as a guide, some basis for estimating his prospects if he had been allowed to continue with the Hunt line. I had hoped—I shouldn't say I hoped—I had asked him to make the same computation for another base. It would be a huge job to take all 19 of them, just to

(Testimony of L. W. Phillips.)

have a little more basis than one. Maybe he should do that tonight and come in to carry on tomorrow with another base.

The Court: I will overrule the objection. I realize you have to start some place in this process of trying to prove your allegations as to damage.

Mr. Rothert: We admit we did not make any profits at [224] the time of the termination, but that does not necessarily preclude us or does not mean we would never have made any profits at any time later on.

Mr. Cullinan: If your Honor please, the thing that is already testified on direct examination is that the commissary purchases by brand at the discretion of the supply officer. Maybe a supply officer at the Naval Supply Depot in this particular period was a particular officer who was a friend, who would buy a certain amount of goods, but that would not establish anything for any other base or for any other period of time.

Mr. Rothert: The California law, as I understand it, does not preclude the showing of prospective profits.

The Court: If there is some evidence that a certain volume of business is built up, there might be inferences that could be drawn from it. I think your objection really goes to the weight of the testimony rather than to its admissibility. Maybe when he gets all through it won't have any weight, but I think there is no just basis for excluding the opportunity to present whatever the plaintiff has in

(Testimony of L. W. Phillips.)

the matter in that regard, whatever showing he needs to make. I think the objection really goes to the weight rather than to the admissibility of the testimony. I will overrule the objection.

Mr. Rothert: It may be of assistance to the Court. I [225] have a California Supreme Court decision, which is a very short statement on this question of prospective profits. Your Honor's statement is practically one hundred per cent correct.

The Court: Let us wait until we get the evidence. I will overrule the objection.

Q. (By Mr. Rothert): What was the total amount of sales to the commissary at the Alameda Air Base?

A. For this twelve months' period that we recapped, \$10,805.52.

Q. Did you check the invoices of Hunt's on which you paid for that very same merchandise sold to Alameda? How much was the invoice price——

Mr. Cullinan: If your Honor please, I want to get this clear before we get into it. If the man has invoices present, I do not want to clutter up the record with all these invoices, but I would like permission to take them with me this evening to check them over after he has testified to a summary of the invoices.

The Court: You can arrange to examine the details. Go ahead.

Q. (By Mr. Rothert): What was the cost of

(Testimony of L. W. Phillips.)

the Hunt Products that you sold to Alameda commissary for the \$10,500 and some figure?

A. \$10,805—the cost was \$10,050, a difference of \$755. [226]

Q. You said this twelve month period.

A. From April to April.

Q. There was not any other period in which you sold to Alameda Air Force Base, was there?

A. No.

Q. Now, you have a record of the volume of each item that you sold?

A. That is right; as a breakdown of each individual item—the 55.

Q. I am not going to ask you for each of the 55. What was the largest volume item?

A. 46-ounce tomato juice.

Q. How many of those were sold in the twelve months? A. This shows 249.

Q. 249 what? A. Cases.

Q. That is an average of about 20 a month?

A. That is 20 per month, yes, sir.

Q. What was the lowest item in volume?

A. Eight-ounce spinach—300 spinach—one size of spinach.

Q. Spinach in size 300 cans? A. Yes, sir.

Q. What was the volume on that?

A. Three.

Q. For the whole year? [227]

A. Yes, sir.

Q. What was the total number of cases that you

(Testimony of L. W. Phillips.)

sold of all items and all sizes for that total amount?
Have you got it added up?

A. Awfully quick. 2,148, approximately. I may have missed it a case or two, but 2,148.

Q. What percentage of profits did you make in the later sales as compared to the early sales?

A. Our early sales——

Mr. Cullinan: Just a minute. If your Honor please, I think there ought to be some foundation laid as to how he arrives at this percentage which is early sales and later sales.

The Court: You will have to lay a foundation. What do you mean by “early”?

The Witness: The first three months vs. the last three months.

Q. (By Mr. Rothert): What was the percentage of gross profit for the entire year’s business at that one commissary? A. Seven and a half.

Q. In the sales in April of 1952, have you computed or do you have any record there of what profit or percentage of profits you made?

A. Five—approximately five per cent.

Mr. Cullinan: Can we establish the foundation of how [228] he computed this percentage? What were the factors to compute five per cent? What figures and factors did you use?

The Witness: Well, we used the cost—our purchase order cost, and then Hunt’s cost to us, and the difference on the selling price.

Q. Do you have five per cent written down somewhere?

(Testimony of L. W. Phillips.)

A. No, but I am fast enough on figures. There is a five average, and then it gradually increases as it goes along.

Q. You have here a list of each sale and each purchase from Hunt Foods? A. Yes, sir.

Q. One opposite the other? A. Yes, sir.

Q. The column entitled C, that is costs?

A. Yes.

Q. The column headed S is sales?

A. Yes.

Q. And are these down in chronological order?

A. Yes, sir, by dates.

Q. What is the third column, P.O.?

A. Purchase order numbers, so they can be identified.

Q. I will put that with the invoices themselves. Did you review the invoices for any other commissary store? A. Fort Ord.

Q. Fort Ord? [229] A. Yes, sir.

Q. Do you have the same amount of review of computation for Fort Ord?

A. Not profit-wise, just cost-wise.

Q. What total items did you sell at Fort Ord?

Mr. Cullinan: If your Honor please, it will be understood that my objection that this is incompetent, irrelevant and immaterial goes to the Fort Ord business, too.

The Court: Overruled.

A. Fort Ord, on the invoices which I checked, which was four, to give us a pattern, because we

(Testimony of L. W. Phillips.)

picked what we call a heavy item and a little item to do that—you couldn't pick all big ones——

Mr. Cullinan: Just a minute, if your Honor please. I object to this. If he developed some theory of his own as to how he picked the pattern, I am in no position to tell what this pattern is.

The Court: You had better lay a foundation as to how this was done.

Q. (By Mr. Rothert): Did you review all of the Fort Ord invoices?

A. I reviewed four months of Fort Ord—five months.

Q. When did you start selling at Fort Ord?

A. Immediately when we took it over. We were always selling them some stuff. [230]

Q. What five months did you take?

A. It looks like the last three of 1953—the first three of 1953 and the last two of 1952.

Q. That is five months?

A. Yes, the last few months we had it and the month or two previous to that. [231]

The Court: I think you had better prepare this, Mr. Rothert. I do not feel that it is proper to take up the Court's time in doing this calculation here. You ought to have some schedules, exhibits prepared to show the manner in which you are calculating your complaint for damages so that they are ready to be presented to the Court and explained, but I can't see giving the time to having the witness thumb through papers and look at items that he has made notes on and give testimony on it. It is

not in a shape that the Court can follow it. I have tried cases and participated in cases involving different subjects. You will have to have some data that is already prepared so it is in exhibit form, in some intelligent form so that the trier of the fact can follow it and see how the claim is made, the basis of the claim. It has to be prepared in advance. We can't take the time to have the calculations made in the courtroom as a part of the testimony. It takes up too much time.

Mr. Rothert: Does your Honor think it would be better to adjourn now? [231]

The Court: We will take a recess until tomorrow morning and see if you can have something in concrete form that can be followed. I see that the witness is using a lot of pencilled notations that he has made, which is very difficult for us to follow. There ought to be something prepared to indicate at least the basis upon which you claim a list of prospective profits can be calculated, something that can be more concrete in form.

Mr. Rothert: I understand that, your Honor, and I would like to ask a question so that the evidence will be as concrete and also as extensive as the Court thinks would be most helpful.

The Court: Mr. Rothert, it is not up to me to advise counsel. I have enough to do to try to decide the case, but I do not like to decide cases in the dark, and if I am obtusive at all in these matters it is because it is unsatisfactory in getting at the matter. You have to do the best you can with it. But this is a rather unsatisfactory method of pro-

cedure. There should be a little more preparation.

Mr. Rothert: Since it happens to be about the end of the afternoon I would request that we adjourn now, and when we start in the morning I will have a statement that may be of assistance.

The Court: Gentlemen, see if you can get the evidence in. Do you have any more witnesses? [232]

Mr. Rothert: We have, yes.

The Court: Many?

Mr. Rothert: No.

The Court: Have them here tomorrow and let us see if we can't proceed a little more rapidly in this case. You gentlemen are being a little leisurely in the presentation of this case. Perhaps it is not altogether your fault. I think this case should have had a pre-trial. Matters should have been agreed upon. That all should have been handled in a pre-trial conference. It may be you are not at fault. If I had this case before I would have made you pre-trial it. The issues that required evidence would have been narrowed. All these documents could have been offered in evidence a long time ago in pre-trial, just put in one after another, given a number without more, on a stipulation that letters were sent or received. I am not blaming you for that. Probably it was not called to your attention. That is one of the great factors, important factors, rather, in the pre-trial procedure, to eliminate much of this time-consuming business.

For instance, the defendant has introduced almost 40 letters. They could have been in in one fell swoop and reference made to whatever you wanted to refer

to at the time of trial. Likewise with respect to the plaintiff's exhibits. I apologize for lecturing you. We have so many other cases, that is one of the reasons we should make use of the pre-trial [233] procedure to eliminate tedious procedures that are not necessary.

Suppose we meet at 10:00 o'clock in the morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., Wednesday, November 30, 1955. [233-A])

Wednesday, November 30, 1955—10:15 A.M.

The Clerk: Phillips v. Hunt Foods, further trial.

Mr. Rothert: Ready.

Your Honor, may I make a very brief statement by way of explanation at this time in view of your Honor's justified comments yesterday? We had computed and based the allegations of the complaint as to damages on a theory or on a basis based on the total volume of sales in the commissary stores and what we considered a reasonable percentage of that business available to the plaintiffs on sales of Hunt Foods.

Last week in getting the evidence together we ran into the problem that the total sales of the commissary stores could not be proven with admissible evidence for a variety of reasons or a number of reasons, so that we shifted or adopted a different basis for estimating damages and that was the primary reason why we weren't as well prepared as

we might have been otherwise. And we are ready to proceed with that this morning.

But before calling Mr. Phillips to the stand, I had subpoenaed and there is in court Col. Bivens of the Sixth Army. I would like to call him because it will be very short.

The Court: Very well. [235]

Mr. Rothert: Col. Bivens, please.

COL. ARTHUR L. BIVENS

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you please state your name to the Court, sir?

The Witness: Col Arthur L. Bivens.

The Clerk: Please spell your last name?

The Witness: B-i-v-e-n-s.

Direct Examination

By Mr. Rothert:

Q. Col. Bivens, what is your present station and duty in the military, in the United States Army?

A. My station is the Presidio of San Francisco; my duty is as quartermaster to the Sixth Army.

Q. And does the Sixth Army have a certain number of commissary stores at its military bases in this area? A. Yes, sir, it does.

Q. And do you have any information concerning the volume of sales at any of the commissary stores on any of the Army bases under the Sixth Army?

A. I have some information on total sales vol-

(Testimony of Col. Arthur Bivens.)

umes from some of the stores in the Sixth Army area.

Q. Is that for the Presidio and Fort Ord?

A. The Presidio and Fort Ord, yes.

Q. Do you also have information as to the commissary store at the Oakland Army Base? [236]

A. That's right, yes, sir.

Q. Is that under the Sixth Army's jurisdiction?

A. That is not under the supervision of the Sixth Army.

Q. Do these figures you have relate to one year's period from November 1st, 1954, to October 31st, '55?

A. That's right, I believe, yes; November, '54, through October, '55.

Q. And what has become of or what is the availability of similar records or information for prior years to that period?

A. Generally, records are retained for one year after the year in which they are developed, or the year in which they accrued. They are then either destroyed or in some cases returned or forwarded to Kansas City for permanent storage. [237]

Q. Are the records with the information that you have records that go back as far as the records that are now available under your custody? I mean, do you have any other information about commissary sales prior to the year's period covered by this information which you have?

A. I couldn't answer that question. I don't know exactly what is available.

(Testimony of Col. Arthur Bivens.)

Q. I mean right here in your headquarters at the Presidio.

A. Other than the information which I have with me?

Q. Yes.

A. I can't tell you what we do have there without reviewing it and checking it.

Q. These records of sales, how do they come to your headquarters? I will withdraw that. Do the purchasing officers or officers in charge of commissary sales in the Sixth Army make any regular reports of the sales in their commissaries?

A. The commissary officers make regular monthly reports on sales to the office of the Quartermaster General.

Q. Do those reports also come to the Sixth Army headquarters, copies of them?

A. I don't know whether we retain copies of those reports or not. The commissaries in the Sixth Army do retain copies of the reports.

Q. Was this information that you have obtained from the commissary stores from copies of these reports? [238] A. Yes.

Q. This information, as I understand it, shows a total volume of all sales, the total sale of meat products and the total sale of fresh produce, is that correct? A. Yes, sir.

Q. Was this information obtained that you have brought with you to court at your direction by people subordinate to you in the army?

A. Yes, sir.

(Testimony of Col. Arthur Bivens.)

Q. Will you state what the dollar volume of total sales for the Presidio commissary store was during the period given of one year from November 1st, 1954, to October 31st, 1955?

Mr. Cullinan: If your Honor please, I will object to the question. The answer would be incompetent, irrelevant, immaterial in this matter. The total volume of sales at the Presidio or any other place would not be material to any of the issues in this action.

The Court: How would it be material, counsel?

Mr. Rothert: In this respect, your Honor: It would tend to indicate that the volume of canned goods sales and purchases at commissary stores is very large and would impose no practical limitation on the opportunities or availability of sales from the quantity of business alone. In other words, if the total amount handled in the whole [239] area is \$100,000 and somebody is trying to get a part of it, it would be an entirely different picture than if there were one million, two million, five million or some huge amount.

The Court: Your question was total volume.

Mr. Rothert: Not limited to canned goods.

The Court: Is this limited to canned goods?

Mr. Rothert: No, it is not limited to canned goods. It is all sales. There have been many statistics——

The Court: Are you able to have the witness break it down?

Mr. Rothert: All the figures that are available

(Testimony of Col. Arthur Bivens.)

are total sales, meat and fresh produce, and I will concede that the volume of canned goods sales is not contained in these figures as any separate item, but, as I understand it, the food business, like many others, has been thoroughly studied and investigated on experience, past performances, and there are accepted percentages, accepted by the industry as a reliable estimate of the proportion of total sales in a super market or a store of that kind, of the total sales.

The Court: I do not want to interrupt you. It doesn't make very much difference whether the figure is admissible or not. It is a question of what weight is there to it. What would it mean, anyhow? If it were preliminary, if you say you would give the figures first—if you are giving the [240] total figures first and then you are going to tie it in with some other data or some other calculations——

Mr. Rothert: I think I can tie it in with proof——

The Court: ——I see no objection to admitting the testimony, but I say to you at the time it is admitted it will be of no value unless it is tied up with something.

Mr. Rothert: I will concede that.

Mr. Cullinan: Also, if your Honor please, the particular records that the Colonel is talking about are for a one-year period just concluded from November, 1954, to November, 1955, limited to three bases.

The Court: He may have other evidence. I think

(Testimony of Col. Arthur Bivens.)

he may present some other data. I don't know. You can't shut off testimony that is partly—that may be—that may have a later relevance to it because at the time it has not got complete relevance because the attorney can't present all of his evidence in one instant of time. I do not think the objection that it is excludable is good. As I say, standing alone, it has no weight whatever.

Mr. Rothert: I do not want to have anyone misunderstand me as to what I am going to do. I will not be able to produce any other evidence of total sales of any other commissary at any other period of time.

The Court: I will allow the question to be answered. I do not think the Court would be justified to just exclude [241] any piece of evidence on the ground it is immaterial. If it appears later that it is not connected up in any way or it has no materiality, you can move to strike it out or the Court will simply not give it weight.

Q. (By Mr. Rothert): Would you answer the question, Colonel? Do you remember it?

A. Yes. I believe it was the total sales of the Presidio commissary.

Q. Yes.

A. I would like to state that these figures have not been authenticated as such, but they were taken from the report referred to.

Mr. Cullinan: If your Honor please, I will object to the figures on the basis that they are unauthenticated figures.

(Testimony of Col. Arthur Bivens.)

The Court: How did you obtained them, Colonel?

A. They were obtained by a person under my supervision from a copy of the report which had been forwarded to Washington.

Q. It was taken from the copy of the report of the Quartermaster of the Sixth Army and sent to Washington?

A. No; a report of the commissary officer prepared by the commissary officer.

Q. Part of your own records?

A. A part of the records of the commissary and of the Quartermaster General in Washington, [242] yes.

Q. You may answer the question.

A. The total is \$2,723,326.53.

Q. For what commissary is that?

A. The twelve months referred to for the commissaries of the Presidio of San Francisco.

Q. (By Mr. Rothert): What was the total for the same period of time at Fort Ord?

A. The same period at the commissary at Fort Ord, the total was \$2,659,452.14.

Q. What is the total sales for the same period at Oakland?

A. For the commissary operated at the Oakland Army Base, it is \$642,865.42.

Q. Will you give the figures for each base during the same period for the meat products and the produce just so that we have all three figures? Is that fresh meat?

A. Yes, the meat market.

Mr. Cullinan: If your Honor please, we will ob-

(Testimony of Col. Arthur Bivens.)

ject to any testimony about how much meat they sold.

Mr. Rothert: I will withdraw the question and say I have no further questions of the Colonel.

The Court: That is all?

Mr. Rothert: Do you have any cross-examination?

Cross-Examination

By Mr. Cullinan:

Q. Colonel, commissaries carry other items than food, do they not? [243]

A. Yes, sir. You mean items like soap and that sort of thing?

Q. Soap——

A. Non-edible items, they do, yes.

Q. Many non-edible items?

A. I would say a substantial number, yes.

Q. Do they sell clothing at the commissaries?

A. No, sir.

Q. Athletic equipment?

A. No, sir, I believe they have nothing——

Q. Do you know whether they do or you are not sure?

A. Well, I can't say that I am positive because I never checked, but I have never known in my experience of an item of athletic equipment in the commissary.

Q. What about drug items?

A. No, sir, they are not carried as a line.

Q. Jewelry, watches and that kind of item?

(Testimony of Col. Arthur Bivens.)

A. No.

Q. They are not carried in the commissary?

A. No, sir. Those items are considered Post Exchange items. That is different from the sales of commissary. Quartermaster's sales commissaries are operated as grocery type operation and carry only those items which are related to food and to commissary store operation.

Q. Except you can buy Vano, mops and that type of thing? [244]

A. Yes.

Mr. Cullinan: I have no further questions.

Redirect Examination

By Mr. Rothert:

Q. Colonel, will you state whether or not there is any limitation or restriction imposed on the commissary stores in the Sixth Army as to the number of brands of any one item that is carried in the commissary store?

A. A restriction as to the number of brand names of a given item which may be carried, yes, sir.

Q. How is that restriction imposed?

A. By regulation.

Q. Do you know what that restriction is? Can you tell us what it is?

A. No, sir, itemwise I cannot.

Q. Is it uniform for all items or does it vary according to items?

A. It varies somewhat.

Mr. Rothert: I have no further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

Mr. Rothert: Your Honor, I am handing to the clerk and to counsel a typewritten statement which might be used as a guide to assist the Court and counsel in following the further testimony of Mr. Phillips on the damage issue of [245] the case.

L. W. PHILLIPS

recalled as a witness in his own behalf; previously sworn.

Direct Examination

(Continued)

By Mr. Rothert:

Q. Mr. Phillips, since yesterday have you made any computations with respect to the sales at Alameda Naval Air Station that you covered yesterday? A. Yes, sir.

Q. Were there any other invoices you used in your computations since yesterday that you did not use in the figures that you gave in court yesterday?

A. I computed a similar figure.

Q. I am asking you whether there were any invoices? A. Yes.

Q. You have those additional invoices?

A. Yes, sir.

Q. Where are they? A. In this file.

Q. How many are there?

A. Approximately five—four or five.

Q. At the time you made the computation that you made yesterday from these invoices which coun-

(Testimony of L. W. Phillips.)

sel has returned to me, did you have those five invoices on the witness stand? A. Yes, sir.

Q. You did? [246] A. Did I have them?

Q. Yes. A. I had them, yes.

Q. Was there any reason why you did not include those five?

A. With those? They are a different base.

Q. The ones you got there, are they for Alameda Naval Air Station?

A. Those are for Fort Ord.

Q. I will get at it this way: Have you computed the total sales and the cost of those goods sold for Alameda Naval Air Station commissary for a twelve-month period? A. Yes, sir.

Q. How much were the sales and how much did you pay for those goods?

Mr. Cullinan: I will object, if your Honor please, that this testimony as to what this man sold to Alameda and how much it cost him has no relevancy to the issue of damages in this case. He has taken some invoices, he has listed the total sales he made in a particular period of time to a particular base. That lays no basis for any kind of a foundation for the establishment of the possible prospective damages.

The Court: I do not quite follow you on that. He has to start some place. All he is doing is analyzing the figures of the sales that were actually made. In and of [247] itself, of course, it does not prove any damages, but I would think it might have some relevance, relevance with respect to the volume of

(Testimony of L. W. Phillips.)

business done and the profit of that business during the period he was operating.

Mr. Cullinan: For instance, the average per cent of profit was about a certain percentage in a twelve months' period at Alameda when he was starting in business. That is not relevant to any issue in this case. If he wants to show——

The Court: I do not quite follow you. Why wouldn't it be relevant?

Mr. Cullinan: As far as damages go, it has no bearing on what damages the man might suffer in the future.

The Court: Well, the man is in business for a year and he wants to show he would lose some business—there's a basis for showing how much he might make next year.

Mr. Cullinan: That is my point.

The Court: When you sell a piece of real estate, you show the income of the property for a period of time and upon the basis of that you calculate what the income from the property would be in the future. I just do not quite get what your point is. You have to start some place in the process of producing evidence. I do not see anything. Maybe it won't demonstrate there was any profit, but I don't see how I can shut the mouth of the witness on something that might have some relevancy. Overruled. [248]

Q. (By Mr. Rothert): Do you have your notes with you, Mr. Phillips, as to the Alameda Naval Air Station? A. Yes, sir.

(Testimony of L. W. Phillips.)

Q. I am giving you this typewritten memorandum merely for whatever assistance it might give you. Was that typed up from figures which you computed yourself? A. Yes, sir.

Q. State what the total sales of the Alameda commissary were during the twelve-month period and the amount that you paid for that merchandise and the gross profit from those sales.

A. On the sales that are listed we paid \$10,806.87.

The Court: When you say on the sales that are listed——

The Witness: The twelve-month sales.

The Court: Yes, but what is the amount?

The Witness: The cost?

The Court: No.

The Witness: The amount of sales?

Mr. Rothert: You suggest that on the sales that were listed.

The Court: That does not mean anything for the record.

The Witness: The twelve-month sales of the Alameda commissary stores were the reselling price; we received \$11,586.01.

Q. (By Mr. Rothert): And how much did you pay Hunt Foods [249] for that same merchandise?

A. \$10,806.87.

Q. Did you pay Hunt Foods for all of that merchandise? A. Yes, sir.

Q. You may recall that yesterday you gave some figures, approximately \$10,800, for the total sales,

(Testimony of L. W. Phillips.)

and \$10,050 for the total purchases. Can you explain why these figures are different from the ones you gave yesterday?

A. You have an invoice in your file that I didn't have on a percentage you wanted to show, and I added that invoice to this total and there is the variance.

Q. Did you also compute the amounts of the sales and cost for the first ten orders at Alameda during that twelve-month period? A. Yes, sir.

Q. What were the amounts of the sales and the costs and the gross profit from the first ten orders?

A. We paid or we sold the merchandise for \$2,196.13. We paid \$2,058.73.

Q. Did you do the same computation for the last ten orders of that twelve-month period?

A. Yes, sir.

Q. What were the sales and costs for those ten orders? A. We sold——

Mr. Cullinan: If your Honor please, I would like to [250] object. There is no showing here that the market remained the same or what the basis—why he took the last ten orders and the first ten orders. I think that ought to be brought out as to what these orders are.

The Court: I suppose he is endeavoring to show that in times past it was more favorable to a profitable operation.

Mr. Rothert: There is an increase in the profit margin and an increase in the volume.

The Court: I will overrule the objection.

(Testimony of L. W. Phillips.)

A. Our selling price of the merchandise was \$3,715.34. Our cost was \$3,362, and I believe it is seven cents.

Q. (By Mr. Rothert): Did you have any reasons for picking out the Alameda commissary stores for this analysis? A. Yes, sir.

Q. What?

A. We had 54 items of Hunt foods in there which gave us a cross-section as to the variety of sales of most of their merchandise. We picked the high one and the low one.

Q. When you say 54, is that items and sizes?

A. And sizes, yes, sir.

Q. When you first started contacting the Alameda commissary, were they handling Hunt's products? A. They might have——

Mr. Cullinan: If your Honor please, I object to that. This witness is not qualified to know whether they were [251] purchasing Hunt products. He is neither with the air station nor is he with Hunt Foods. He is just a man in the food business. We might as well ask any customer whether they were selling Hunt Food products. No customer would be qualified to testify to that.

The Court: I will overrule the objection.

The Witness: The records that we received from Hunt——

Mr. Rothert: No——

The Witness: This is a lead-up to the question. You want it answered?

(Testimony of L. W. Phillips.)

The Court: Don't you tell him what it is going to lead up to. Listen to the question.

Q. (By Mr. Rothert): Did you visit the Alameda Naval Air Station commissary early in the period you started selling Hunt products?

A. Yes, sir.

Q. Did you look at the shelves in the commissary when you visited them? A. Yes, sir.

Q. Did you make any investigation to determine what was being sold there by brands and so forth?

A. Yes, sir.

Q. When you did that, did you see whether any of Hunt's products were then being sold, on the shelves for sale? A. I didn't see any. [252]

Q. What was the total number of cases sold to the Alameda commissary for twelve months of all items and sizes?

A. 2,145, I believe the figure is.

Mr. Rothert: Your Honor, I am going to skip the things that are merely mathematical computations as far as testimony is concerned.

Q. Did you make any similar analysis for the business you did at Fort Ord? A. Yes, sir.

Q. What period of time did you select for Fort Ord? A. January, 1953, until April of 1953.

Q. Four months? A. Yes, sir.

Q. Why did you pick only four months for the Fort Ord commissary?

A. That is when we received the same items over the same period of time, so we had a correct analysis.

(Testimony of L. W. Phillips.)

Q. When you say the same items, do you mean the same 54 items and sizes?

A. No; the same nine items and sizes that we were selling.

Q. What was the experience at Fort Ord before January, 1953, as far as your sales there were concerned?

A. Some months we would sell them five items; other months we would sell them nine; other months we would sell them four, six, and a variety of items. So we didn't have any [253] correct analysis.

Q. What was there that makes the sales of the four months started January, 1953, any different from the sales prior to January, 1953?

A. We were able to sell them the items continually for the four months.

Q. More consistent sales?

A. That is right.

Q. During that four months' period, what was the total sales to Fort Ord and what was the purchase price to you for the same merchandise?

A. Our selling price for the four months was \$4,360.50.

The Court: No; you are looking at Hamilton.

Mr. Rothert: On the typewritten sheet?

The Witness: I am sorry. \$6,344.42.

Q. (By Mr. Rothert): Where are you looking at now? A. I looked at Hamilton. \$6,344.42.

Q. What was the cost of it? A. \$6,053.97.

Q. Did you say 53?

(Testimony of L. W. Phillips.)

A. \$6,053.97. Or is it 33? It is 33, I guess. This type is not so very clear.

The Court: Should it be 53?

A. 33.

Q. (By Mr. Rothert): What was the gross profit? [254]

A. Mathematically there is a \$310.45 difference.

Q. How many items and sizes were sold at Fort Ord during that same period? A. Nine.

Q. What was the total number of cases sold in those four months? A. 1,205.

Q. Did you make a similar study of the business done at Hamilton Air Force base?

A. Yes, sir.

Q. What period did you select?

A. January, 1953, until April, 1953.

Mr. Rothert: There is a mistake on the type-written sheet, your Honor. It should be January, 1953.

Q. Why did you select those four months rather than some other period?

A. We found a number of items selling consecutively during that period of time so we could correctly make an analysis. Otherwise you could not if there were skips anywhere.

Q. In the period before January, 1953, how did the sales go?

A. Well, the sales were spotty. Some months we would get a large order, other months we would get a small order. Some months—they would vary that way until we got a line out and Hunt's in.

(Testimony of L. W. Phillips.)

Q. You studied the sale price that you received from [255] Hamilton Air Force base and the cost of those items to you during that four months' period?

A. The selling price was \$4,360.50. Our cost was \$4,191.70.

Q. With a gross profit of \$169.80?

A. Yes, sir.

Q. What was the number of items and sizes sold at Hamilton Air Force? A. 33.

Q. What was the total number of cases sold during that four-month period? A. 645.

Q. Did you study the invoices and records to determine whether there were certain items that were sold out of the three of those bases, Alameda, Hamilton and Fort Ord? A. Yes.

Q. What were those items that were common to all three bases?

A. Hominy, tomato sauce, pears, ketchup, tomato paste, tomatoes, 300; tomatoes, 2½, and the common—that was common to all three—common to Alameda and Ord was blackberries and new potatoes.

Q. Using the items you have just named that were common to the three bases in your sales, did you compute the average number of cases per item at each of the three bases? A. Yes, sir. [256]

Q. What was that average for each base?

A. Five in Alameda, eight in Hamilton, and 33½ at Fort Ord.

Q. I didn't ask you what was the percentage of

(Testimony of L. W. Phillips.)

profit on the four-month sales of the Fort Ord commissary that are covered by your previous testimony. A. Five per cent.

Q. What was the percentage of profit at the Hamilton Air Force commissary for the four months that you covered in your previous testimony? A. Four.

Q. Was it one of these three commissaries that you did not handle right from the beginning?

A. Yes.

Q. Which one?

A. Hamilton Air Force base.

Q. When did you start to make sales to Hamilton, approximately?

A. About December, 1952.

Q. Did you make any attempts to sell to Hamilton before December, 1952? A. No, sir.

Q. Why?

A. Hunt Foods asked me to let that base alone until their man was transferred over there, as he was a very close [257] friend of Mrs. Bennett, the buyer, and I said, "That is fine with me because I will be very busy with this other stuff."

Q. During this period—by this period, I mean the time that you were selling Hunt Food products—how did the price of the Hunt's items compare to the competing lines during the same time?

Mr. Cullinan: Just a moment. When you say competing lines, you should be specific. I object to the question, if your Honor please. I think it ought to be specific. Does it compare with S&W, does it

(Testimony of L. W. Phillips.)

compare with somebody else's brands? Just how does it compare with all your commodities——

Mr. Rothert: What were the brands of food products that you found were being sold in the commissary stores during the same period of time in the same items that Hunt sold?

A. My competition was S&W, Wellman, Sunblest and Conference.

Q. Were there any others? Was that all the competition?

A. There would be some items on various brands, but that was the principal competition. Those people were actively soliciting the commissary business.

Q. How did Hunt prices compare with the prices of each of those brands that you have mentioned?

Mr. Cullinan: Excuse me. Of which time are we talking?

Mr. Rothert: Throughout the entire period of December, [258] 1951, to and including April, 1953.

Mr. Cullinan: If your Honor please, I object to this question. I think first it ought to be established that there was a standard of comparison all through those years. Here we have a 12 to 13 months' period.

The Court: I think that is a little technical, counsel. I will overrule the objection.

The Witness: The question again?

Q. (By Mr. Rothert): State what the difference, if any, or the relationship between the prices on the Hunt products and the prices for the competing lines you just enumerated a moment ago

(Testimony of L. W. Phillips.)

during the time that you were handling the Hunt line in these commissary stores.

A. The difference was 22 per cent.

The Court: What does that mean?

A. The difference between the Hunt—the cost of Hunt merchandise and what the competing selling price on the shelf of other brands that we saw was.

Q. (By Mr. Rothert): Was that a uniform difference throughout all items and sizes? Is it an average or what?

A. It is an average.

The Court: Did you calculate that average?

A. Yes, sir.

Q. (By Mr. Rothert): Was there any competing items of any of those competitors you named that was priced below the [259] price of the Hunt item, the same item produced by Hunt at the same time?

A. No, sir.

Q. Was there any competing item that was priced as low as the price for the same item produced by Hunt at the same time?

A. In these brands that I spoke of?

Q. Yes.

A. Were they lower than Hunt's prices?

Q. As low as.

A. No, sir.

Q. Was there any item during that period of time produced by Hunt's that was not priced below all the prices of the competing items, competing brands of the same items you just enumerated?

A. The Hunt's costs to us were never higher

(Testimony of L. W. Phillips.)

than the selling price on the shelves of these brands of which we speak.

Q. The question was, was there any item at any time of the Hunt's line that was not priced below the price of all the competitors? A. No——

Mr. Cullinan: May I have that question and answer read?

(Question and answer read.)

The Witness: All the competitors that we list here. [260]

Q. (By Mr. Rothert): There is no question. You say something about all the competitors that were listed here? Were there some competing items or brands that you did not mention that were priced as low as Hunt's at any time?

A. We never saw them. These here were the items in the stores and due to their limitations they were limited to certain numbers and these were the ones we saw.

Q. Did you ever see any Del Monte or Libby products on sale at the commissary stores?

A. A few, yes, sir, a few priced higher.

Q. Did you ever see Stokely?

A. I never did.

Q. Were there any other commissary bases where the purchasing officer had indicated that he would install the Hunt line but it had not been installed prior to the termination——

Mr. Cullinan: If your Honor please, this is hearsay to Hunt Foods as to what this man and some

(Testimony of L. W. Phillips.)

commissary officer discussed as to what might happen in the future.

Mr. Rothert: May I add to that question, then, in the presence of any representative of Hunt Foods?

The Witness: Yes, sir. [261]

Q. Who was the representative of Hunt's Foods who was present? A. Mr. Steiger.

Q. In what commissary store was that?

A. Mather Air Base at Sacramento.

Q. Is that the only one or were there any others?

A. At Mare Island Naval Supply—Mare Island commissary store at Mare Island under Commander Shea.

Q. When did that occur?

A. I would say it was in March or April of 1953.

Q. Mr. Phillips, you have stated that you were with Safeway Stores for a number of years. At any time during that period were you in any department that studies the statistics of the food industry? A. Yes, sir.

Q. In what department was that?

A. In Safeway's analytical department which sets up records for buying—for purchasing and supplies.

Q. When were you in that department?

A. 1941 and again in 1945; see, it was '41 and again '45. A short while in '45, but the full year of '41.

Q. Have you at any time during your business

(Testimony of L. W. Phillips.)

experience made studies and studied reports of statistics concerning the canned food industry?

A. Yes, sir, for ten years as a buyer for [262] Safeway.

Q. Are there any published statistics concerning the sales of canned foods in that industry?

A. Yes, sir.

Q. Is there any percentage that is regularly accepted in the canned food industry as the percentage of total grocery store and super market sales that represents the sale of canned goods alone? Don't state the percentage; I am just asking you whether or not there is.

A. Yes, sir.

Q. In that business, what is the percentage of total sales in super markets and grocery stores that represent sales of canned food alone?

Mr. Cullinan: If your Honor please, I will object to this on the ground that it is incompetent, irrelevant and immaterial and on the further ground that this witness is not qualified to testify as to any statistics. What the statistics are for super markets may not have any relation to a commissary.

The Court: What was that last question, Mr. Foster?

(Reporter read the question.)

The Court: Well, I think the objection is good. What the percentage of canned goods sales in super markets is, even if you were competent to give

(Testimony of L. W. Phillips.)

those figures, doesn't seem to me to be material. I will sustain the objection.

Q. (By Mr. Rothert): From your experience and observation [263] with commissary stores and super markets, Mr. Phillips, are there any differences in the operations that would vary or change the proportion of canned goods sold out of total sales in commissary sales and super markets?

A. Yes, sir.

Q. What are those factors that would create any difference?

A. One factor is the limitation on brands involved. Instead of having eight brands of peas, they are allowed four. That would increase the sale of the brands that were there. Another limitation is——

Q. Just a moment. I am talking about total sales, not larger volumes for any one brand.

A. Total sales?

Q. Just the proportion of the total sales in the whole store represented by the total sales of canned foods whether there is one brand or a hundred brands in those total sales of canned foods.

A. There are three factors. One factor is the matter of the buying power of the personnel. The average buying power of the personnel is \$235 a month.

Mr. Cullinan: Just a minute. If your Honor please, I will move to strike that last answer.

Mr. Rothert: I will stipulate that it is hearsay.

The Court: Yes, this is far afield.

(Testimony of L. W. Phillips.)

Mr. Rothert: As I understand it, your Honor—I don't [264] want to make a statement in front of the witness either.

The Court: I don't quite see the point of this examination.

Mr. Rothert: I will explain it.

The Court: Obviously there is a lot of canned goods sold. Is that what you are trying to show?

Mr. Rothert: Well, in substance, yes. I understand there is an accepted percentage in the industry that out of all sales in the industry—sales in super markets, for instance——

The Court: I don't think it would have any materiality at all. Of course, there is a lot of business. It is just a question of how much business this witness would have done if there is evidence to that effect.

Q. (By Mr. Rothert): Now, Mr. Phillips——

The Court: I think perhaps we will take a brief recess at this time.

(Recess.)

Q. (By Mr. Rothert): Mr. Phillips, you have computed the relationship in the volume of sales of common items in the three commissary stores, Alameda, Hamilton and Fort Ord; I think you named those items? A. Yes, sir.

Q. And stated an average number of cases per item. What do your records show—take two or three examples—of the [265] number of cases sold

(Testimony of L. W. Phillips.)

per month, average number of cases sold per month of tomato sauce at those three bases.

A. What did our records show?

Q. Yes.

A. 15 in Alameda, 10 in Hamilton and 30 in Fort Ord.

Q. And what does it show as to tomatoes, the two sizes?

A. The 300 size shows 6 Alameda, 10 Hamilton and 46 at Fort Ord.

Q. The 2½ size?

A. Shows 6 in Alameda, 10 Hamilton, 77 at Fort Ord.

Q. Take pears, size 300.

A. Shows 3 in Alameda, 6 in Hamilton and 41 in Fort Ord.

Q. My copy shows 8 at Hamilton; is that right?

A. 8. I am sorry. 8, yes.

Q. In what way does the difference in volume of sales of these common items enumerated at the three bases indicate that future sales of the Hunt line in the Hamilton and Fort Ord commissary stores?

Mr. Cullinan: I will object to that, if your Honor please. That calls for the opinion and conclusion of this witness.

The Court: Yes; sustained.

Q. (By Mr. Rother): In your opinion, Mr. Phillips, had your sales of the Hunt line not been terminated when it was, would you or would you

(Testimony of L. W. Phillips.)

not have made a profit from the sale [266] of Hunt's products during the year 1953?

Mr. Cullinan: I will object to that, if your Honor please, as calling obviously for the opinion and conclusion of this witness.

Mr. Rothert: I will concede that it does. That is why I framed the question that way. If he is unable to testify to these matters, I suppose that would leave those matters to the realm of the argument, someone else's opinion.

The Court: Well, I suppose he could give testimony, on the basis of the experience of the year, as to what a certain volume of business in the future would produce by way of profits. That may be admissible.

Mr. Cullinan: But he is asking the witness for——

The Court: I think the question that you have objected to as improper in the form that it is asked.

Mr. Cullinan: I think that even that whole theory, your Honor, would be to have the witness testify to what a judge or jury, if there had been one, would have to decide from the previous experience, not this witness' guess or estimate of what he might have done.

The Court: If he says he did, let us say, 11,500 cases in dollars' worth of business at Alameda in twelve months, in a twelve months' period, I think he is competent to testify to what his estimate would be as to the volume of business he would be able to do in the next year and what the [267] percent-

(Testimony of L. W. Phillips.)

age of profit would be on the increased volume of business because that was his own business.

Mr. Cullinan: Well, there has been nothing established in the evidence so far of past history of previous years that would be any indication of what is going to happen next year profitwise or volumewise.

The Court: There never is in these cases where it is sought to recover for speculative profits. How can you tell if the business is cut off at a certain point? It has to be on the basis of estimates; it can't be on the basis of actuality, because you wouldn't be here in court. I am assuming that a breach of contract is shown and you reach the point where the case proceeds on the theory of the loss of prospective profits. It has to be on some basis of estimate. I suppose the trier of the fact could draw some conclusion; he would have to have some basic facts to go on.

Mr. Rothert: I can ask him——

The Court: I think you have already asked him some questions along that line as to the proportion in which the cost of doing business would increase on increased volume.

Mr. Rothert: Yes, I have, your Honor. I could ask him some questions on assumptions rather than opinions.

The Court: Frame some other questions. I think the present question is objectionable.

Q. (By Mr. Rothert): Mr. Phillips, if you assumed that in [268] the Fort Ord commissary the

(Testimony of L. W. Phillips.)

same number of items and sizes or an equivalent number of items and sizes of Hunt products were purchased and sold by that commissary, can you state approximately what volume of sales you would make to Fort Ord—— A. Yes, sir.

Mr. Cullinan: If your Honor please——

Q. (By Mr. Rothert): In one year.

Mr. Cullinan: I will object to this question as calling for the opinion and conclusion of this witness and point out to your Honor that he has already testified as to Fort Ord that he took a four months' period because sales before that had been pretty sporadic, so he took a specially selected four months' period. From that he has estimated into a twelve-month period. Now, he wants to estimate on the estimate as to what would happen in the next twelve-month period. He has already admitted that at Fort Ord it was sporadic and that is why he picked the particular four months.

Mr. Rothert: I think he is entitled to use the improvement he had accomplished at the time of the termination.

Mr. Cullinan: If any.

The Court: I think I would allow that. I will overrule the objection. [269]

A. I would show that we would do about \$84,000 a year in Fort Ord, which is seven times Alameda.

Q. (By Mr. Rothert): Assuming that you sold the same number or an equivalent number of items and sizes at Hamilton Air Force Base that you had sold to Alameda in the twelve months' period of

(Testimony of L. W. Phillips.)

your experience at Alameda, can you state approximately what quantity of business you would have had at Hamilton Air Force base?

Mr. Cullinan: Same objection, your Honor.

The Court: Overruled.

A. About \$18,000.

Q. (By Mr. Rothert): From your observation in the work that you did at these commissary stores—I don't mean just these three, but all 19—were there any other commissary stores at military bases as large as the three, Alameda, Fort Ord and Hamilton?

A. Yes, sir.

Q. What were the others that were as large?

A. Presidio, Mather Air Force base, Castle Air Force base.

Mr. Cullinan: When you use the word "large," are we referring to personnel?

Mr. Rothert: I meant personnel and activity in the commissary stores, not large in the size of the territory. Was that the way that you understood the question and the answer you gave? [270]

A. Yes, sir, I understood you asked for the volume done, the percentage of volume done in Alameda, Ord and Hamilton.

Q. Yes, compared with the other 16.

A. Yes, sir; what commissaries compared with those three, yes, sir.

Q. With the same assumptions I have previously stated as to getting the same or equivalent items and sizes in all three, Alameda, Fort Ord and Hamilton commissary stores, what volume of

(Testimony of L. W. Phillips.)

sales would you be able to make to those three commissary stores in one twelve-month period?

Mr. Cullinan: I will object to this, if your Honor please, in addition to the other grounds previously stated that we have no evidence before us as to what kind of business he did at Castle Air or these other places.

Mr. Rothert: This only applies to three, Alameda, Hamilton and Fort Ord. It is really just a computation of adding up the three separate items, that is what it is.

The Court: I will overrule the objection if you change the question to read, would he estimate, rather than would he be able to produce.

Mr. Rothert: Yes.

Q. What do you estimate would be the volume of business at those three named air commissary stores if you sold to all three of them the same or an equivalent number of items and sizes which you actually did sell to Alameda in that [271] twelve-month period? A. \$111,000 plus.

Q. Assuming a volume of business of that amount, to what extent would your cost of doing that business be increased over the cost of business you actually had in the sales you actually made to those three bases?

A. There would be very little increase due to the systematic method of government purchases.

Q. Will you explain what you mean by systematic method?

A. Certain times for certain orders, and you

(Testimony of L. W. Phillips.)

had to go service the base anyway, whether you got one case or four thousand, you should go see the base, which we did, and that cost was in the first cost, and if you got an order for 4,000 cases there it was. The time element would probably increase some but your travel would be the same; you couldn't go any farther than Camp Beale or any farther west than Parks and you couldn't go any farther south than the southernmost base, which we did. You couldn't go any farther in the central part of the base than McClellan and Mather, and that is the way it was.

Q. How about the cost of office expense?

A. Office expense would increase slightly because of the billing, because your billing on 54 items at one case is no more than 54 times at a hundred cases each, and we were billing several items. [272]

Q. What do you estimate your margin, your percentage of profits would have been on that assumed quantity of business in the year following the time when your selling of Hunt lines was terminated?

Mr. Cullinan: If your Honor please, I will object to that. There is no foundation laid for any estimate what the cost of the man might be or anything that might give an estimate of what the profits might be, the cost of billing, as an example. We have to have something that shows what the cost of billing might be.

The Court: Read the question.

Mr. Rothert: Maybe I could clarify that. I meant my question to refer to the gross percentage

(Testimony of L. W. Phillips.)

of profit; that is, the difference between the cost to him of purchasing the items from Hunt and the price at which he would sell them to the commissary stores eliminating office expense and travel expense.

Mr. Cullinan: Same objection.

The Court: Overruled.

A. You want to know—can I have that question again? It was asked twice. Would you read the question?

(Question read: “Q. What do you estimate your margin, your percentage of profits would have been on that assumed quantity of business in the year following the time when your selling of Hunt lines [273] was terminated?”)

Mr. Rothert: That is in the next year after you were terminated.

The Witness: What would our profit have been?

The Court: In the next year; gross profit.

Q. (By Mr. Rothert): The percentage of gross profit on the assumed \$111,000 or whatever it is of business.

A. In these three bases if we were in there the next year we would have grossed 20 per cent.

Mr. Cullinan: I see the witness is referring to some memorandum there. I would like to ask the witness if he is using that memorandum in connection with the answer just given. If he is, I would like to see the memorandum.

(Testimony of L. W. Phillips.)

Q. (By Mr. Rothert): What were you looking at?

A. I was watching our progress percentages from one part of the year to another to answer his question. I only have the progress figures here from the first of 1952 to the end of 1952 and up until they closed—they took the line away from us in '53. And we have to project that figure, of course, and that is what I was looking at, the figures here.

Q. What are those figures you were looking at, an adding machine tape or something?

A. That is the sales to Alameda Air Station and our profit for the first ten orders and the profit for the last ten orders, and the difference. [274]

The Court: That is the figure you have already given?

A. Yes, sir.

Mr. Cullinan: And that is the basis on which you are making these answers to the last question?

A. That and the figures we have of competitive items that were shown on the shelves at that time. We have that here, every item that was on the shelves and the price it sold for and what we thought we could sell for, and certain items we were selling we were up to these prices, getting that percentage.

Q. (By Mr. Rothert): What is your estimate as to the maximum percentage of gross profit you could have obtained from the sale of the Hunt line after it was terminated?

Mr. Cullinan: What was the question?

(Testimony of L. W. Phillips.)

Mr. Rothert: What is his estimate as to the most favorable percentage of gross profit he could have made in the selling of the Hunt line subsequent to the termination?

Mr. Cullinan: Same objection.

The Court: As to these three stations, you are limiting it?

Mr. Rothert: I am limiting it to these three stations.

Mr. Cullinan: Same objection.

The Court: Overruled.

The Witness: For the following year? [275]

The Court: He has already answered as for the following year.

Mr. Rothert: He has answered as for the following year; he said 20 per cent, as I remember.

A. Yes, sir.

Q. What is your estimate as to whether you ever would have been able to make any profit greater than 20 per cent for a year's business at those three bases?

A. We were averaging on certain items—on the full line when we first started, we averaged one per cent.

Q. Well, just—

A. Well, I will have to answer the question this way so you will understand it.

The Court: No; we will understand you all right if you just answer the question.

Q. (By Mr. Rothert): Could you or could you

(Testimony of L. W. Phillips.)

not have, in your estimate, have made more than 20 per cent gross profit on a year's sales?

A. Yes, sir.

Q. How much more than that?

A. A maximum of 25.

The Court: What is the basis of your answer to that extra 25 per cent? How do you calculate that?

A. That is, if we moved up to everybody and our lines only were in, in which basis we had that condition in some; [276] or if we had two or three lines in that would be reduced because we would be a fraction under on some certain items and we would drop the five. It depends on the condition we were in in the base.

Q. (By Mr. Rothert): What is your estimate as to whether or not, had the arrangement not been terminated, you would have succeeded in getting more items than the 54—more items and sizes than the 54, into and selling to the Alameda Air Base commissary?

Mr. Cullinan: I will object to that, if your Honor please. He had a year to do it in. This would be just a guess as to what he might do if he knew and had a friend in the commissary. He has already said that the sales to the commissary depends on who the supply officer is.

Mr. Rothert: He didn't testify to that at all.

The Court: Not necessarily. I assume you have some loyalty to your client, and, therefore, the merits of the products might have something to do with it.

(Testimony of L. W. Phillips.)

Mr. Rothert: Your Honor, I don't think this witness has testified that his sales depended on any friendship with the commissary officer. He hasn't testified to that. That is an argument that Mr. Cullinan has made here.

The Court: I will overrule the objection.

The Witness: May I have the question read?

Mr. Rothert: May I withdraw the question temporarily? [277]

I will withdraw the question temporarily.

Q. How many different sizes and items of Hunt products were there during the period that you sold the line? A. In Alameda?

Q. No, how many did Hunt's make and have available for sale?

A. Approximately 100 items and sizes.

Q. And of those you had 54 in Alameda?

A. Yes, sir.

Q. What is your estimate as to whether or not you would have gotten additional or more than 54 items and sizes into the Alameda Air Base had you not been terminated?

A. It was a matter of time until they saw how the line sold, until they were being well satisfied, until they put the complete line in. That was our policy, and that is to eliminate bookkeeping and trouble.

Mr. Rothert: I have no further questions.

Mr. Cullinan: Does your Honor wish to adjourn for the noon luncheon now? We might be able to speed up the cross-examination.

(Testimony of L. W. Phillips.)

The Court: Would it be inconvenient for you to start your examination now?

Mr. Cullinan: No, your Honor.

The Court: I think we might use the time. I am confronted with some other matters that are commencing to come my way, and unless it is inconvenient for counsel, I would [278] like to proceed now. I have to wait for the report of the Grand Jury anyhow. If it is convenient, go ahead.

Cross-Examination

By Mr. Cullinan:

Q. You testified, Mr. Phillips, that you picked the period of four months at Fort Ord because the sales were sporadic before that at Fort Ord?

A. The word "sporadic" means, in my language, the items were not all in consecutively, so we could get an analysis. If you had tomatoes in one month and something else in another month, unless you had an even flow of business, you wouldn't have any estimate at all. You would have no way to analyze.

Q. When you started selling at Fort Ord, that was when?

A. They were selling Fort Ord when I took it, some items.

Q. December, 1951, you started at Fort Ord?

A. Yes, sir.

Q. From December, 1951, to January, 1953, the sales were spotty to Fort Ord?

(Testimony of L. W. Phillips.)

A. The sales would vary from a thousand dollars down to \$735 and \$688, \$650, and that is what we call sporadic. That shows the items were not in there all the time.

Q. The items were not in there consistently during the year 1952?

A. That is right; enough items to give us a pattern.

Q. And the same is true of Hamilton?

A. Yes, sir. [279]

Q. You stated that there was a difference of some 22 per cent between the Hunt line and the products of S&W, Wellman, Sunblest and some others you mentioned?

A. Yes, sir; our contracts show that.

Q. Isn't it a fact that S&W, Wellman and these others are the fancy packed type of canned goods?

A. Well, according to Hunt, they told the commissary officers to tell us it was good.

Q. Answer the question.

A. Yes. Which brand is fancy?

Q. Let us take two examples, S&W and Wellman. A. Wellman is not all fancy.

Q. Let us start with S&W. S&W is a fancy pack brand, isn't it?

A. It is supposed to be.

Q. It is, isn't it?

A. It is supposed to be.

Q. You do not know? A. I don't know.

Q. S&W is always a high-priced product, isn't it, compared with its competitors?

(Testimony of L. W. Phillips.)

A. Not necessarily. No, S&W is not the highest priced of canned goods in this cannery.

Q. Is there any throughout this area that is higher? A. Is there one higher? [280]

Q. Yes.

A. It is possible to find it on the shelves. We have the report here.

Q. I am asking you what you know.

A. That is what I know.

Q. You have been in the business for many years? A. Yes.

Q. You can't tell us whether there is a brand that is higher than S&W? A. I can tell you.

Q. Can you tell me what the brand is?

A. Wellman was.

Q. Wellman was? A. Yes.

Q. S&W and Wellman are both high-priced brands, aren't they?

A. Again you would have to clarify "high-priced." Our records here show that they were not out of the ordinary. We had averages here. We have the figures for you.

Q. Mr. Phillips, when you compared Hunt's with S&W and Wellman brands——

A. Yes, sir.

Q. You are comparing what pricewise would be a Ford with a Cadillac, are you not?

A. No, sir; not by a long shot. We got samples in town that were pretty good. [281]

Q. I am talking about pricewise, not quantity-wise. A. Pricewise there is a difference.

(Testimony of L. W. Phillips.)

Q. The S&W brand, for instance, the can is a fancy packed, a certain number of—we will say pieces of fruit in a can. Isn't that the fancy type of brand?

A. I don't think they're as fancy as you state the fact. We have never found it that way.

Q. Was there any brand on the shelves that was selling for lower than the Hunt brand?

A. There could have been some substandard brand or unknown label, but Hunt, being nationally advertised, there weren't any national advertised brands on the shelves selling below Hunt.

Q. Your comparison of difference did not take into account any of those brands?

A. Which brands are you talking about?

Q. The ones that were lesser known and selling about the same price or less?

A. Well, due to the limitation on items, those lesser brands, we didn't find them because we carried the contracts with us, we knew what they had. We knew what items they were selling, because we had the price lists or we had the contracts which are over here.

Q. At any of the commissaries did you find a brand selling at the same or less than Hunt's price on the shelves?

A. That we were selling them for? [282]

Q. Yes. At any of these commissaries were there any can brands selling at the same or less than the price of Hunt's on the shelves?

(Testimony of L. W. Phillips.)

A. There were some cans without a brand, but they couldn't sell them.

Q. Cans without a brand? A. Yes, sir.

Q. Steel?

A. They would be an issue item and they always had trouble. The housewives wouldn't buy them. They would come out of the issue. They would draw them out, but they didn't buy it.

Q. There was no question that there was no can with a label that was selling at or below the Hunt's price?

A. Not in the same quality of well-known brand, no, sir.

Q. Just answer the question. Were there or weren't their brands selling? The same product, without regard to quality, now, at the same or below the price of Hunt's on the shelves.

A. We didn't find it.

Q. Your previous question suggested it might have been that the quality was not as good. Were there any canned goods on the shelves which, in your opinion, were of lesser quality than Hunt's that were selling at the same or less than Hunt's?

A. We would find merchandise at times, spotty sales of something. They would buy some item. But most of them—I would say all the time Hunt's prices were—do you mean, did I find [283] any brand ever at all selling under Hunt's? Well, that is impossible to answer that question. I don't know what kind of a question that is. How can I answer

(Testimony of L. W. Phillips.)

that, did I ever see any brand at any time sold under Hunt's?

Q. On the commissary shelves during your time. A. I never did, no.

Q. You never did?

A. On the list I had there was nothing in Hunt's in the commissary stores that were handled.

Q. Did you ever see the Del Monte brand?

A. Yes, we did, and we have a list of Del Monte prices out in the commissary stores.

Q. How did the Del Monte price compare with Hunt's price?

A. They were higher. We have the record.

Q. How much lower was Hunt's than Del Monte brand?

A. It averaged about 18 per cent on some items, 25 per cent on some items, 6, 7, 8 to 10 per cent on some items. The average was $17\frac{1}{2}$ to 22 per cent. I have the record here.

Q. Have you studied the record so you can say what the difference is, the percentage of difference was between Hunt's and Del Monte on the shelves?

A. Yes, it was our business to know. Otherwise, we didn't want to sell it.

Q. What was the difference between the price that S&W goods were being sold at compared with Hunt's? What is the [284] percentage of difference? A. About 27 or 28.

Q. What about Wellman?

A. Well, would this help you if I read you some prices we have off the list?

(Testimony of L. W. Phillips.)

Mr. Rothert: Answer the question, Mr. Phillips.

The Witness: I would say Wellman was a fraction above S&W.

Q. (By Mr. Cullinan): Above S&W?

A. Yes, a fraction.

Q. You mean 28 or 29 per cent above Hunt's?

A. Will you give a specific item?

Q. Let us take pears.

A. Pears, yes, sir. No. 1 tall pears, of which we have been talking about here, Hunt's cost to us at the time were approximately \$6—\$8.15. On a competitive basis we could have gotten \$11.47 for them. And our records show that we were doing that more than——

Mr. Cullinan: I move to strike that answer, if your Honor please. That is not an answer to the question at all.

The Court: He wanted to know on pears if you could give the prices of Wellman and Del Monte.

Mr. Cullinan: Wellman, Hunt's or Del Monte.

The Witness: Well, unfortunately, Wellman and S&W—no one packed that size pear. That is a sort of offsize. Wellman packs a 303, Hunt packs a 300. [285]

The Court: Can you give any examples?

A. Yes, sir. 2½ pears at the time this survey was made, Hunt's price to us was \$6.90, I believe this shows, and our selling price that we could have gotten was \$9.36.

Q. (By Mr. Cullinan): The question was, what was the price of the competitors?

(Testimony of L. W. Phillips.)

A. I just gave it, \$9.36.

Q. \$9.36? A. I will tell you that.

Q. You picked the pears. Give me the price for S&W, Wellman and Hunt's.

A. Yes, sir. The price on the——

Q. On the shelf at the commissary store.

A. Yes, sir. I have that here. Well, it was 33 $\frac{1}{3}$ cents, Tru-Pak was 41, which is the brand we have surveyed here, and when we surveyed this commissary——

Q. Wait a minute, please. Just answer the question. Give me the prices for these three cans of pears.

A. I will give you four prices that we have. S&W is not one because they were not in. I will give you Libby, of which you asked the question. Libby pears on the commissary shelves were 37 cents, Sunblest pears were 39 cents, Tru-Pak pears were 41 cents, Wellman pears were 39 cents.

Q. What about Hunt's?

A. Hunt's price, our cost was \$6.90 at that time.

Q. For how many cans? [286]

A. Twenty-four cans.

Q. What was the price of Hunt's on the shelves at the time? A. Thirty-five cents, about.

Q. You do not know?

A. Thirty-four and $\frac{3}{4}$, because we were getting 34.3 at that time. They would have to be 35 cents.

Q. What was Del Monte brand pears?

A. Del Monte would not be listed but Del Monte—Libby's list is most always the same on everything. They vary very little in the industry.

(Testimony of L. W. Phillips.)

Q. They are below Hunt's?

A. They are above Hunt's in this case.

Q. In pears?

A. Yes, sir. They were at this time because this shows it.

Q. What time are you referring to?

A. At the time we made the survey in these prices that you asked me about.

Q. What time was that?

A. This was made in 1953.

Q. It was made when in 1953?

A. The early part of 1953.

Q. The early part of 1953?

A. I would say this was made in January, 1953, after the Navy contracts came out.

Q. Did you check the actual shelf prices in January of 1953 [287] at all these commissaries?

A. We checked them every month when I called. We saw the list and compared them.

Q. In January, 1953, you made this so-called survey. In the survey did you check the prices of all these brands on all the shelves?

A. The shelf is the thing I am talking about. When I say shelf, I mean checking the price.

Q. So your figure of 22 per cent difference referred to on your direct examination, that is based upon this January, 1953, survey?

A. No, oh, no. That is based on a continual survey over a period of time, and when we first took the line we had that survey.

(Testimony of L. W. Phillips.)

Q. Will you explain to me the mechanics of how you worked out the 22 per cent?

A. Yes, sir.

Q. Let us start with whether you took a survey from each month during the year 1952 plus January of 1953. Is that what you did?

A. No, no. We took the Navy commissary contracts for the quarter that were active and we made this check, which we picked up at the Navy Purchasing Office, of which we have copies here. We took the price off the Navy's commissary contract, and we found out what the Navy commissaries were [288] paying for the canned goods listed on that contract, and they had dozens of brands listed there for them to buy. We got Hunt's cost and knew the difference, and that is where we get our 22 per cent.

Q. And you compared the costs then with just the brands you mentioned on your direct testimony?

A. We compared at that time—the first time we compared everything we could find in the contracts. This list here is made up from another one that was in 1953, and the one which we talked about is in 1951, you see, but the price differential would remain practically the same all the time.

Q. How often does the Navy commissary contract issue?

A. Every three months.

Q. Every three months?

A. It is. These prices are static for three months.

Q. And your figure was based upon the prices

(Testimony of L. W. Phillips.)

that you obtained January, 1953, in that contract, is that it?

A. These prices that we have here?

Q. The prices on which you base your 22 per cent differential.

A. Both times, the first time and the last time.

Q. When was the first time?

A. About in August, 1951, and we sporadically checked up every three months after that.

Q. You mentioned both times. That is in August, 1951. The [289] next time is when?

A. Every quarter we would check it when it came out.

Q. I understood you to say this differential of 22 per cent—when I asked you what contract, you said both times? A. That is right.

Q. Both times; one was in August, 1951?

A. That is right.

Q. When is the other time?

A. In January, 1953.

Q. You took the August, 1951, contract. You worked out a comparison from that, didn't you?

A. That is right.

Q. How many brands did you consider in comparison?

A. The brands are on here. I think there are seven or eight of the heavy items and three or four of the others. They are on the list here.

Q. In January, 1953, you did the same?

A. Yes, sir.

Q. You had a result in 1951 and a result in 1953?

(Testimony of L. W. Phillips.)

A. We had results all the time. We were talking about those two dates before.

Q. You figured a percentage based on the 1951?

A. Did I figure it?

Q. Did you figure out a percentage differential based upon the 1951 contract? [290]

A. We took the line knowing that figure.

Q. Didn't you figure out, compute a differential in August, 1951, based on the prices in the Navy contract?

A. Yes, sir, and the commissary stores.

Q. Did you compute a differential based upon the January, 1953, Navy contract?

A. Yes, sir.

Q. Will you state what the differential was in the 1951 figures? A. About 22 per cent.

Q. And in 1953? A. About 22 per cent.

Q. It came out exactly the same?

A. It would do that.

Q. In working up that differential, how many items, how many products of Hunt's did you consider?

A. When we figured it out? We considered them all.

Q. All of them?

A. Yes, everything they had.

Q. All 100 plus items? A. Sir?

Q. All 100 plus items at Hunt's?

A. All they had. We took their price lists and figured it out.

(Testimony of L. W. Phillips.)

Q. You compared that price with these companies that you [291] mention?

A. Yes, sir, the price on the shelves of the items that we found.

The Court: If you would like to take the adjournment now, we shall. We will meet again at 2:00 o'clock.

(Whereupon, an adjournment was taken until 2:00 p.m. this date.) [292]

Wednesday, November 30, 1955—2:00 P.M.

The Clerk: Phillips versus Hunt Foods, Inc., further trial.

Mr. Rothert: Ready.

The Court: I'm sorry, gentlemen, there has been this delay in this case but you know how these lawyers get in some of these cases if you don't let them have their say in these cases. We will proceed and we won't take a recess this afternoon until 4:00 o'clock if that is agreeable to you gentlemen. I have a meeting of the judges at 4:00 o'clock and then tomorrow morning we will not be able to have a session because of another matter, so that if we do not finish this afternoon we will have to go over until tomorrow afternoon.

Mr. Cullinan: I have one request, your Honor. I was going to speak to Mr. Rothert, but we walked in in the middle of the Chessman case. I have one witness, who will be very short, not more than five minutes.

Mr. Rothert: I am willing to have any witness put on now.

The Court: Would you like to put him on now?

Mr. Cullinan: Well, he has to leave tonight so we could put him on at the end of the day.

The Court: You may get involved. If you want to be sure he gets away, put him on now. [293]

Mr. Cullinan: We will do that.

Mr. Rothert: Whatever Mr. Cullinan wishes to do.

HANS ERLANGER

called as a witness for the defendant, out of order; sworn.

The Clerk: Will you please state your name to the Court? A. Hans Erlanger.

The Clerk: Please spell your last name.

A. E-r-l-a-n-g-e-r.

Direct Examination

By Mr. Cullinan:

Q. Mr. Erlanger, will you state your position, your occupation?

A. I am an officer of Hunt Foods and in charge of sales.

Q. You are an officer of Hunt Foods?
Yes.

Q. And have you been since prior to 1951?

A. Yes.

Q. Mr. Erlanger, did you have any part in connection with the termination of the arrangement with Mr. Phillips in 1953? A. Yes.

(Testimony of Hans Erlanger.)

Q. And what was your part in that termination?

Mr. Rothert: Well, your Honor, of course anything he said or did outside of the plaintiff's presence would be hearsay, and I would object to any question, including this one, calling for hearsay evidence. I concede that he issued [294] instructions.

The Court: I think you will have to narrow your question.

Q. (By Mr. Cullinan): Mr. Erlanger, did you direct the termination of the arrangement with Mr. Phillips? A. Yes.

Q. For what reasons did you direct the termination of it?

Mr. Rothert: I will object upon the ground that it is calling for the witness' conclusion, it is self-serving on the part of the defendants, not binding on the plaintiff.

The Court: I think the objection is good, counsel.

Q. (By Mr. Cullinan): Mr. Erlanger, prior to April of 1953 had you had any reports from the credit manager of Hunt Foods on the standings of the Phillips account? A. Yes.

Q. And you were kept advised—you were advised of the status of that account? A. Yes.

Q. As a result of the information you had relating to the status of this account did you give any orders as an officer of Hunt Foods with respect to the arrangement with Mr. Phillips?

Mr. Rothert: I am going to object on the ground that it calls for the conclusion and opinion of the

(Testimony of Hans Erlanger.)

witness, it is leading and suggestive, and any orders he gave would be hearsay, would be self-serving on the part of the defendant. [295]

The Court: Sustained.

Q. (By Mr. Cullinan): Mr. Erlanger, as an officer of Hunt Foods do you know why the arrangement with Mr. Phillips was terminated?

Mr. Rothert: Objected to on the ground it calls for the conclusion and opinion of the witness.

Q. (By Mr. Cullinan): I am asking him what he knew.

The Court: I think this line of testimony is objectionable, counsel. It is of no moment that the witness thought about it or what his reasons were; the only thing that we are concerned with are the facts. What was the status of the account? Was the status of the account a breach of the contract or agreement to pay? Those are factual matters. It doesn't make any difference what anybody thinks about them or what orders he gave. The questions of fact you are entitled to bring out.

Q. (By Mr. Cullinan): Did you in April 1953, Mr. Erlanger, know whether the account of Mr. Phillips with Hunt Foods was in default?

Mr. Rothert: I am going to object to it on the ground that it calls for the witness' conclusion and opinion, incompetent, irrelevant and immaterial, in that the evidence as to the status of the account has been stipulated to, that is, that a certain amount of money was owed and unpaid.

The Court: I don't see the materiality of

(Testimony of Hans Erlanger.)

whether the [296] witness knew the status of the account or not.

Mr. Rothert: I will stipulate that of the amounts represented by the trade acceptances signed after termination, that most of that amount was unpaid as of the time of termination, without knowing the exact figures, but it was a substantial amount.

Q. (By Mr. Cullinan): And you knew that, Mr. Erlanger, in April of 1953, did you not?

Mr. Rothert: I will object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Cullinan: If your Honor please, this series of questions is obviously designed to show that an officer of Hunt's directed the termination because of the status of this account. The defendant is a corporation; it acts only through its officers. If this were an individual employer who took action, his testimony would be permissible.

The Court: But, you see, counsel, it doesn't make any difference what intramural decision was made on a matter unless the matter is communication to the other party. The officer of the corporation could meet with another officer of the corporation and have discussions with him and make any decision he wanted. It is of no moment unless that which was done is warranted in law or by the contract of the parties, and unless it is communicated to the other party what intramural [297] decisions were made. He might have made a decision that he was going to discontinue the contract because he didn't

(Testimony of Hans Erlanger.)

like this man's appearance, or because he didn't like his name, or because he didn't wear the right kind of clothes to suit the atmosphere of the concern. He could have made the decision for any number of reasons. An uncommunicated decision doesn't mean anything.

Mr. Cullinan: But Hunt's is being——

The Court: That would mean that he would be deciding the case. "I dismissed this man and I cut off his contract because he didn't pay his bills promptly." [298]

That doesn't mean anything to me. I don't care what his reasons are. Lawsuits aren't determined on such a basis as that.

Mr. Cullinan: Hunt's is being sued for a termination, an unwarranted one of an assumed contract. If Mr. Erlanger was doing business as an individual and he told one of his subordinates to cancel the contract, his reasons for doing so, even if only communicated from him to his assistants, would be pertinent to show whether the termination was justifiable or not.

The Court: I don't think the communication would determine whether the dismissal was justified or not. If the contract was one that provided that payments had to be made within a certain time and the evidence showed that payments weren't made within the time required, then the abrogation of the contract would be justified by the facts. It wouldn't make any difference what reason he gave or who he spoke to or what he did about it or

(Testimony of Hans Erlanger.)

whether he knew about it or not. All that had to be done was that the contract be abrogated and if the fact is that it was broken because of non-payment within the required time, then the dismissal is justified. It doesn't make any difference what he says about it; it is the facts that determine that matter. Those facts depend upon what the terms of the contract as to payment were and when the payments were made. [299]

Mr. Cullinan: Excuse us for a moment.

The Court: Certainly.

Mr. Cullinan: No questions.

Mr. Rothert: Your Honor, since Mr. Erlanger must leave this evening, I would like to ask him some questions as an adverse witness and ask leave to do so at this time. That will go beyond the scope of the direct.

The Court: What?

Mr. Rothert: The questions I have in mind are not within the scope of counsel's direct testimony so I am asking leave at this time to ask the witness a few questions as an adverse witness since it is necessary that he leave this evening.

Mr. Cullinan: I don't see that that is necessary or desirable, your Honor. Mr. Erlanger has not been under subpoena. We do have produced and have kept in the courtroom other witnesses that Mr. Rothert has asked us to produce. I don't think that because Mr. Erlanger was here and is leaving that he should be now interrogated.

The Court: Well, now, of course, he is here and

(Testimony of Hans Erlanger.)

I think that either counsel can always interrogate a witness that is here.

Mr. Rothert: Having him here——

The Court: That applies to both sides. Have you any extensive examination? [300]

Mr. Rothert: No, your Honor.

The Court: All right. Go ahead.

HANS ERLANGER

called as a witness on behalf of plaintiffs as an adverse witness; previously sworn.

Direct Examination

By Mr. Rothert:

Q. Mr. Erlanger, are you the representative of Hunt Foods who made certain arrangements with Francois L. Schwarz Company in 1953?

A. Yes.

Q. Did you prior to the end of April 1953, tell Mr. Lee Miller that you had made arrangements with Francois L. Schwarz, Inc., to handle the sale of the Hunt products to military bases on a world-wide basis?

A. That's correct.

Q. And did you tell him that that would necessitate terminating Mr. Phillips' arrangement for selling to military bases in Northern California?

A. Yes.

Mr. Rothert: No further questions.

(Testimony of Hans Erlanger.)

Cross-Examination

By Mr. Cullinan:

Q. Mr. Erlanger, what was the reason for making arrangements with Schwarz?

Mr. Rothert: I will object on the ground it calls for the conclusion and opinion of the witness and is incompetent, [301] irrelevant and immaterial. The questions I have asked I submit are in the nature of an admission against interest.

Mr. Cullinan: I am certainly entitled to examine on the basis of the last question that Mr. Rothert asked as to what reasons——

The Court: I think that the examination would be limited to the conversation, that is all. All that counsel asked was whether or not this witness made a statement in a conversation.

Mr. Cullinan: Yes. Would you read the last question of Mr. Rothert's, please?

(Record read as requested.)

Q. (By Mr. Cullinan): Did you at that conversation tell Mr. Miller what the reasons for terminating or for employment of Schwarz?

Mr. Rothert: Objected to on the ground that it is hearsay.

Mr. Cullinan: We are entitled to the whole conversation, your Honor.

Mr. Rothert: Hearsay, incompetent, irrelevant and immaterial.

(Testimony of Hans Erlanger.)

Mr. Cullinan: We are entitled to get the whole conversation.

The Court: Your question was did he tell him.

Mr. Rothert: I think that question really should be [302] considered in connection with the previous one because in the previous one he said he told Mr. Miller that he had made arrangements with Francois L. Schwarz Company to handle sales to all military bases on a world-wide basis.

The Court: You have opened up a conversation now. He is entitled to inquire as to the conversation on that subject. I will overrule the objection.

Q. (By Mr. Cullinan): Will you tell us what you told Mr. Miller at that time?

A. Mr. Miller came into my office——

The Court: No. Just say what you told Mr. Miller.

A. I told——

The Court: Without anything else. Just what the conversation was.

A. This conversation took place that Mr. Miller told me.

Mr. Rothert: I am going to object, your Honor——

The Witness: That Mr. Phillips wanted——

The Court: No; the question was, State what you told Mr. Miller.

Q. (By Mr. Cullinan): What you told Mr. Miller with respect to the reasons for terminating—I mean for making the——

(Testimony of Hans Erlanger.)

The Court: Mr. Erlanger, you just state what you said to Mr. Miller.

A. I told Mr. Miller that at the brokers and canners' convention in Chicago I had a discussion with Francois L. [303] Schwarz Company regarding taking over the military business on a world-wide basis; that I felt that this company could be most beneficial to Hunt; and that due to the fact that we don't get enough business out of Northern California and at the same time Mr. Phillips doesn't take care of his financial commitments, that I would like to terminate the connection with Mr. Phillips.

Mr. Cullinan: That is all.

Mr. Rothert: I have a couple more questions, your Honor.

The Court: You say you have one more question?

Mr. Rothert: I do, yes. I am just finishing my notes.

Redirect Examination

By Mr. Rothert:

Q. When was it that you talked to the Schwarz Company at the brokers' and canners' convention?

A. I believe the brokers' and canners' convention took place the end of February of that year.

Q. Of 1953? A. Yes.

Q. And when was it that you had this talk with Mr. Miller? I think my question merely was was it before the end of April. Can you tell us any more exactly when it was?

A. I couldn't tell you the exact date.

(Testimony of Hans Erlanger.)

Q. Can you tell us what month it was in?

A. To the best of my knowledge, I believe it was the end of March or the beginning of April. [304]

Mr. Rothert: I have no further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

The Witness: Thank you.

The Court: Now you wish to continue with the cross-examination of Mr. Phillips?

Mr. Cullinan: Yes. [305]

L. W. PHILLIPS

resumed the stand; previously sworn.

Cross-Examination

(Continued)

By Mr. Cullinan:

Q. Mr. Phillips, in your determination of the differentials between the Hunt Prices and the prices of these other companies on the shelves, did you take an average of the prices of, say, S&W and then take an average of the prices of Hunt's?

A. No. You are talking of an average of all items together?

Q. Yes.

A. No; each separate item by itself.

Q. You took each separate item and then you took an average of, let's say, pears, for instance, S&W has X price for pears and Y price and you compared those prices, took an average of those prices on pears?

(Testimony of L. W. Phillips.)

A. It would have been S&W or any other brand I found in there, yes, sir.

Q. And then you would do the same thing for tomatoes? A. Yes, sir.

Q. Take an average of the price of tomatoes, let's say tomato paste? A. Yes, sir.

Q. And then you would take an average of the price of fruit cocktail?

A. That's right, sir. [306]

Q. And then you would take an average of one kind of pears—the terminology I am not familiar with—we will say a fancy kind of pear or a sliced pear or there is a half pear?

A. I believe there is, yes.

Q. You would take, for instance, one kind of pears and compare S&W prices on that with Hunt's prices on that and then figure the average of that type of—

A. Figure the percentages that could be gained, yes, sir.

Q. And then when you had your list all made up—or did you make a list up? A. Oh, yes.

Q. Do you have that list? A. Oh, yes.

Q. Then when you made the list up, how did you work out the average profit of 22 per cent?

A. Yes, sir.

Mr. Rothert: Not profit.

The Witness: Gross.

Mr. Rothert: Differential.

The Witness: Differential.

Mr. Cullinan: Differential.

A. It was worked out on the basis of my knowl-

(Testimony of L. W. Phillips.)

edge of the sale of canned goods over 20 years of watching it.

Q. Wait a minute; excuse me. I want to know when you had this all down on the sheet, then what did you do? Did you add [307] up the columns on one side and the columns on the other?

A. No, no.

Q. What did you do?

A. That wouldn't be the right way to do it. I took the average sales of each item as they were that I had received in the commissary stores—they told me how much they were buying of any item—and I computed the profits extended on each item across, and then added up the difference, and that was the figure I used.

Q. I am talking about the differential of Hunt's price and the price of these competitors on the shelves.

A. Yes, sir. May I explain it a little further for you?

Q. Wait a second. You worked out these figures item by item? A. That's right.

Q. The percentage of differential item by item?

A. How each item sold about, yes, sir.

Q. Now, when you had that total all made up for each item, did you then add the percentages in one column and add the percentages in the other and divide? A. No.

Q. What did you do?

A. We took what you would call a trial order and we projected the profits on the trial order using

(Testimony of L. W. Phillips.)

items we knew of Hunt's and items of the other brands, according to how much was [308] sold. In other words, if a base told me, "I buy 20 cases of ketchup, 20 cases of this, 10 cases of something else, 5 of something else and 3 cases of something else," I extended all those prices out by Hunt's cost and brought that invoice down, because that was the way they bought the items. Then I took the same cases of another brand that we were comparing with and did the same thing and brought it down, and the totals together was the correct percentage.

Q. So you made assumptions that if five cases of S&W paste was bought they will sell for so much, and then made a similar assumption for Hunt's?

A. It wasn't an assumption; it was what they told us, and after that figure, knowing that it was easy to figure; if you have got both costs or both selling prices it is very simple.

Q. Were your comparisons, say, on tomato paste a number of cases from S&W compared with a number of cases from Hunt's? Did you assume the same amount of cases of each company's produce?

A. For each?

Q. Yes.

A. Yes, sir, of each item; oh, yes.

Q. Do you have that sheet?

A. We have this sheet here is the prices.

Q. I am asking you, are these papers that you have there the papers from which you worked out the 22 per cent? [309]

(Testimony of L. W. Phillips.)

A. No; that was in '51.

Q. You do not have the papers that you worked out the 22 per cent differential on?

A. No; I have the price papers only here, not the 22 per cent differential.

Q. Let me take a look at these.

A. Sure.

Q. Then you didn't give any weight to the volume of a particular product at a particular commissary?

A. What they told me. We could only take what they said, what their records showed; that's all we had to go on.

Q. But you compared equal volumes as between one competitor and Hunt's, did you not?

A. Sir?

Q. You compared equal volumes as between Hunt's and some other competitor of Hunt's?

A. That's right. Oh, yes.

Q. So that the actual volume that Hunt's might have done or S&W might have done was not a factor in your computation?

A. The only factor was that Hunt's would have been more due to their label—due to the advertising factor they would have done more business.

Q. In other words, you didn't take into account the volume in any particular company's price?

A. Oh, yes; we knew the volume that they were selling of [310] every brand.

Q. But you didn't take it into consideration; you

(Testimony of L. W. Phillips.)

used an assumption of an equal amount of each company's products?

A. According to the number of items they were allowed to carry, yes, sir.

Q. How would you compare, for instance—let me state, some packers use a 303 can, don't they?

A. That's right.

Q. And Hunt's is a 300 can?

A. That's right.

Q. How did you compare prices on an S&W 303 can and Hunt's 300 can? Let me also ask, isn't it a fact that the 303 can is 17 ounce and the 300 about 15?

A. 15½, a difference of about 10 per cent. We adjusted the figure down to compare favorably.

Q. You adjusted the figure down?

A. Fortunately S&W I don't believe at that time—I don't remember the fact, but wherever there was a difference in the price which Hunt had, they had this 300 tall, an off size, we knew about that; we had to watch that item, we knew we had to watch that and get under the 303 other one on which we figured.

Q. You can't compare five cases of S&W 303 cans with five cases of Hunt's 300?

A. One is 24, the other is 48. That is the difference. [311] But you can compare by dozens.

Q. But the volume, the content is quite different, isn't it? A. Not so much different.

Q. One is 17 ounces, the other is 15 ounces?

(Testimony of L. W. Phillips.)

A. Hunt has done a wonderful job with the item.

Q. We will stipulate to that. A. Yes.

Q. What I am getting at is you can't compare the price of a case of 303 cans with that of a 300 can because you have more ounces of the product in the case of 303 cans?

A. We used the sale of 303. We knew 300 would be larger. We knew it would be more, so we were using a lower figure all the time to assume those factors. You had to. You couldn't take a chance of going over. You had to get under.

Q. So in working out your 22 per cent you did then compare the price of a case of 303 cans with the price of the cases of 300?

A. No, not prices. The differential showed in the case. If there were a smaller can, we showed a smaller can. They had a picnic can in the same position. You had to watch the ounce content to sell it.

Q. Leaving that for a moment, on the question of the markup that you might have gradually made on articles that you sold to the commissaries, Hunt sells to chain stores and to [312] wholesalers at about the same cost it sold to you?

A. That is right.

Q. If you raised your prices to the commissaries, you would have to watch, wouldn't you, that you didn't raise them so that the commissary price would be higher than the chain store or a super market down the street, wouldn't you?

(Testimony of L. W. Phillips.)

A. That is right.

Q. Your markup possibilities were qualified by the fact that you could not mark it up to an extent where it would not compete with the price down the street of the super market or the chain store?

A. Yes, we paid for the survey we got every month to figure that out.

Q. That is one limitation on whatever markup you would take.

Mr. Rothert: Is that a question?

Mr. Cullinan: He answered my question.

Q. Now, Hunt's—

A. You asked the question, was that a limitation on any markup that we might have?

Q. No; you have answered my previous question. I am asking you this question now: Hunt's had jobbers selling canned goods, didn't they?

A. Very sporadically because they were a direct seller to the chain and super markets.

Q. There was nothing to stop a jobber of Hunt's from going [313] to the commissaries to sell, was there? A. How is that again?

Q. There was nothing to stop the jobbers of Hunt's from going to the same commissaries you were dealing with? A. Not a bit except—

Mr. Rothert: Just a minute. I am going to object on the ground it is ambiguous. It calls for a legal conclusion. We understand that Mr. Phillips' arrangement was exclusive.

Mr. Cullinan: Yes; I am not talking about Hunt's.

(Testimony of L. W. Phillips.)

Q. Let me ask you this: Jobbers were free on their own to come to commissary stores to sell Hunt products to commissaries?

A. Not according to Hunt's agreement with us.

Q. Is there anything in that bulletin—well, I will withdraw that. I am not talking about Hunt's sending the jobber in.

A. You are talking about a jobber?

Q. I am talking about a jobber that decides to compete with you.

A. Hunt told us when we took it, if they found a jobber trying to sell a commissary store, they would ask him to stop it.

Q. They would ask him to stop it?

A. Yes, sir.

Q. When was that said? [314]

A. That means he would stop it.

Q. When was that said?

A. At the time that I met with Mr. Flynn.

Q. Mr. Flynn said that to you?

A. I don't remember if it was said there or not, but it was said somewhere in our conversations that we would be protected in our jobs with the commissaries.

Q. You do not remember whether it was stated at the meeting with Mr. Flynn or not?

A. I don't remember that, no, but it was in the conversation. It was broadcast rather extensively.

Q. So some time when you were dealing with Hunt's somebody at Hunt's told you if the jobbers started to compete they would ask them to stop?

(Testimony of L. W. Phillips.)

A. They told me that, yes. We didn't have any trouble.

The Court: I don't see the materiality of this.

Mr. Cullinan: I am getting down to what freedom he would have in his markup at the commissaries.

The Court: Yes, I understand what you are getting at. It seems to me it is purely a hypothetical subject.

Q. (By Mr. Cullinan): Mr. Phillips, in your sales to the commissaries, it was your plan, wasn't it, to have the Hunt products priced on the shelves between the high price and the low price items?

A. It was my plan? [315]

Q. Yes.

A. It was my plan to watch competition in a commissary store.

Q. But your shelf structure—let us use the term—was that you wanted the Hunt product wherever you could to be right between or at least between the higher priced canned goods and the lower priced canned goods?

A. You mean that was our policy?

Q. Wasn't that your policy?

A. Our policy was to watch the competition, and we took as much as we could take.

Q. In watching your competition you tried to keep the Hunt products in between the high priced products and the low priced products, didn't you?

A. We tried to protect the label to be sure it

(Testimony of L. W. Phillips.)

was sold. That sometimes didn't mean what you are saying.

Q. Wasn't it your plan, and didn't you work it out that way, that the Hunt products were generally in between in price the more expensive and the less expensive of the same products?

A. On some items that was possible.

Q. That was your plan for as many items as you could do it with?

A. Sure, naturally it would be in order to get the business, sure. [316]

Q. And you did that with a number of Hunt items, didn't you?

A. We sold lots of odd items at a very low figure to get started and because their prices were obsolete, but we also moved items up.

Mr. Cullinan: Will you read the question?

(The last question was read.)

Q. (By Mr. Cullinan): Answer that question.

A. What did I say?

Mr. Cullinan: I move to strike the answer as not responsive.

The Witness: Ask the question again.

Mr. Rothert: You will have to go back to the last question.

Mr. Cullinan: Very well.

Mr. Rothert: I think the reference to the word "that" may have been obscure. You did "that" with a number of items. What does that mean now?

Q. (By Mr. Cullinan): You succeeded, did you

(Testimony of L. W. Phillips.)

not, Mr. Phillips, in placing as many commissaries and placing Hunt's items in at a price bracket which was between the high and the low priced brackets for the same commodity?

Mr. Rothert: You mean the competitors?

Mr. Cullinan: The competitors.

The Witness: We succeeded in placing them under new—the first time? [317]

Mr. Cullinan: May I ask that the question be read?

(Question read.)

A. Yes.

Q. (By Mr. Cullinan): Wherever that was done, you were limited on the markups that you could make on that Hunt product because you would push it into the higher bracket, competing with the higher bracket, wouldn't you?

A. I don't understand the question.

Q. Where you have Hunt's below the higher priced merchandise, the same commodity——

A. That is right.

Q. ——there you are limited in the amount of markup?

A. No, you would move up there if you had a volume.

Q. Do you mean you would price yourself into competition with the highest priced products?

Mr. Rothert: You gave an example in which only the highest priced product was mentioned.

Mr. Cullinan: Well, the next highest.

(Testimony of L. W. Phillips.)

Mr. Rothert: What I am getting at, if I can say it succinctly, is this:

Q. You are limited, are you not, where you are limited, the high priced labels, were your prices under the high priced labels, you are limited competitively in the amount of markup you can make on the Hunt product lest you move it over to the bracket of the brackets of higher price? [318]

A. I would have to understand what you mean by "under." Use an example and I will tell you what was done.

Q. Suppose you are a few cents under, let us say, S&W. A. Items, please? Pears?

Q. Say pears.

A. All right. When you say a few cents, you mean how many?

Q. Three cents. A. Three. All right.

Q. Where there is that much of a spread you are limited as to how much you can increase the Hunt price because if you increase it a couple of cents, two or three cents, whatever the example was, you would be in the same price bracket?

A. That is right, and we would not do that.

Q. You would not do it?

A. Didn't want to do it. We moved from one cent to two, maybe two cents to one, but we would have watched it pretty closely.

Q. You testified as to your costs, I think the purchase price of goods sold to Alameda Air Station. Is that the figure of \$10,806.07—would that be the gross price less discount?

(Testimony of L. W. Phillips.)

A. You mean—I took the invoices that were paid on face. There was no discount on them.

Q. You took the face of the invoice?

A. Yes, sir.

Q. You did not allow for any discounts in this figure of [319] \$10,806? A. No.

Q. In your percentage of profit that you estimated on the Alameda Air Station summary, that percentage of profit would depend upon what items were sold, wouldn't it? What kind of items were sold?

A. Well, if you had—no. How would the percentage depend upon what kind of items were sold?

Q. Which items? A. Yes, sure.

Q. Because of the spread difference in some item? A. That is right.

Q. And the spread differs from item to item.

A. You mean the profit on one item is greater or smaller than another? The markup?

Q. That is right.

A. That is the policy in the wholesale business.

Q. The percentage of profit depends upon what item was sold at a particular time to a particular commissary?

A. That was our business to watch that, yes.

Q. And your profit, too, during the period of time varies according to competition, doesn't it?

A. How is that again?

Q. Your profit, the amount of your profit varies according to competition. If the others come down,

(Testimony of L. W. Phillips.)

you have to come [320] down in your price, don't you?

A. You are talking about the people who are in the commissary store?

Q. No, I am not talking about your prices to the commissary stores.

A. That would apply in anything, yes, sure. If they went way down, we would have to go way down.

Q. Your profit varies, therefore, from time to time according to the state of the competition that you are experiencing?

A. Yes, sir, but these people that I was in competition with were very careful and watched the commissary prices and kept them up, because they had to watch the super markets, trying to sell them, too. If they sold the commissaries too cheap and the super markets found out—they had probably 8,000 super markets to work against 19 commissaries—no jobber would cut the price to commissary stores. He would be foolish.

Q. Some time at the start of your arrangement with Hunt's you sold at cost or less in order to get the item into the commissary, didn't you?

A. No, not in order to get it in. They were posted by Hunt's sales force.

Q. Didn't you have a controversy at one time with Mr. Denison about moving into the commissary in the early days of your dealing with [321] Hunt's? A. Commissary?

(Testimony of L. W. Phillips.)

Q. A controversy with Denison for selling at less than the cost of goods to you?

A. Yes, but we never sold anything at less than cost. On ketchup, are you talking about?

Q. Yes.

A. No, we never sold ketchup below cost. We came down at one time from a particular good profit to beat Denison, but we still sold above cost. We still made a profit.

Q. Mr. Phillips, you have testified that in 1952 your gross on Hunt's business was some \$94,000, I think you said.

A. We show that on the billing. The cost would have been less, because whatever we paid, the difference between our billing and the cost would be our little profit that we made.

Q. So the \$94,000 is your gross sales from Hunt's products?

A. Yes, sir.

Q. That was in the year 1952?

A. Yes, sir.

Q. Your 1952 income tax return shows gross receipts from business of \$347,175.11?

A. That is right.

Q. So the excess over the \$94,000 was in other business?

A. Bidding.

Q. Bidding business?

A. Yes, sir. [322]

Q. And the brokerage?

A. Well, the brokerage wouldn't show there. The brokerage doesn't show up in our sales. The sales wouldn't show in the brokerage, I don't believe. Correctly it should not.

(Testimony of L. W. Phillips.)

Q. The 1952 income tax return shows other income, commissions earned, \$3,906.15. Is that brokerage? A. That is brokerage, yes.

Q. That figure is larger than the 1951 brokerage commissions, isn't it?

A. Well, the brokerage, because we had a man working in the brokerage business at that time, yes, sir.

Q. In other words, in 1952 your brokerage income was substantially larger than it was in 1951?

A. Not only substantial, if I remember, we didn't have any in 1951, because we were not in the brokerage business. We hired an employee to handle it in 1952.

Mr. Cullinan: May we have the 1951 income tax return just to refresh his memory?

The Witness: That is all right. I don't remember any brokerage. There may have been.

Q. (By Mr. Cullinan): Mr. Phillips, my notes I took from your records show commissions earned in 1951, \$2,773.43.

A. I didn't remember it. It might have been possible.

Q. Would that refresh your recollection?

A. I don't know how we earned it. That probably wasn't it. [323]

Q. Let me just ask you these questions, Mr. Phillips. This summary or notes that you gave me a little while ago on one page entitled "Average selling prices for items commonly carried in the commissary store in Northern California," it says

(Testimony of L. W. Phillips.)

that means "all other items"? A. Yes.

Q. Then you have apricots, blackberries and other items listed. A. We have.

Q. Case cost at time of survey, lowest competition—that is the case cost? A. That is right.

Q. And then Hunt's cost?

A. That is right.

Q. How did that show any difference where a case may be of 300 cans or a case of 303 cans?

A. I don't believe—if I am correct on that list—in other words, if they had 24, we would have 48.

Q. I am asking you how do you compare a case cost of 300 cans with Hunt's cost of 303 cans?

A. We reduced the price of the 303 cans immediately. We would have to.

Q. You do not show any working out of that?

A. No, that is just a rough figure.

Q. And that is the figure that you used when you were [324] testifying? A. No.

Q. I mean this is the basis.

A. No, that is not the basis.

Q. This is why I had this in my hand.

A. No, I was adding it up myself.

Q. This total and this total you have subtracted?

A. That is right.

Q. Does that give you the percentage of your profit? A. No.

The Court: I do not know what you are getting at when you say "this total and that total."

Mr. Cullinan: I do not understand what this is, your Honor. I was trying to find out what it was.

(Testimony of L. W. Phillips.)

The Court: It is not in evidence.

Mr. Cullinan: That is all, your Honor.

Mr. Rothert: I have three or four questions, your Honor.

Redirect Examination

By Mr. Rothert:

Q. You were asked whether the markup you could get on selling Hunt's products was qualified or limited by the sales by Hunt's to the general stores. I would like to ask you to what extent would that factor be a limitation on your markup?

A. The commissary stores, if they were selling something higher than a chain on a shelf, the same brand, we might have to [325] watch it, but we could move up to that figure.

Q. What was the comparison of the price at which Hunt's would sell to chain stores and the price at which Hunt's could sell to you?

A. Approximately the same as on a jobbing basis. If they bought a car it might save a nickel a case or something, but it was about the same.

Q. Were the Hunt's products sales in super markets and chain stores any different than the jobbing prices from Hunt's?

A. Do you mean—you mean the selling price?

Q. Yes. A. Oh, yes, quite a bit.

Q. What accounts for that difference? What is that difference?

A. The markup that the super market would take in his retail operation.

(Testimony of L. W. Phillips.)

Q. To what extent; that is, by how much of a limitation was it caused by the prices of Hunt's products on sale in the chain stores to you in your business selling to the commissary stores?

A. How much the different was between my cost and what the super markets sold it for? Is that what you mean? The difference between my cost and the super market?

Q. My question is how much of a markup could you place on the Hunt's prices to you until you got to the point where you [326] had trouble because it equalled the chain store selling prices?

A. About 22½ per cent. We had a survey on it there. That is in the record.

Q. The competing lines such as S&W, Tru-Pak and Monarch that you mentioned, that you found being sold in the commissary stores—were those lines handled by jobbers?

A. They were handled by private label jobbers that took an excessive markup on private label, which is the common practice.

Q. Was the markup or profit that you attempted to get on the sale of Hunt's products corresponding to the jobbing markup on the sale of competing lines by jobbers? A. Private label jobbers?

Q. Yes. A. Yes, sir.

Q. And about the markup that the chain store operator placed on the prices after he bought them?

A. Yes, sir.

Q. You testified to gross profit from sales, actual sales to Alameda Air Station commissary in 12

(Testimony of L. W. Phillips.)

months. Was that gross profit computed by subtracting the cost of the merchandise from the total that you sold it for? A. Yes, sir.

Q. And in stating the percentage, is that the approximate percentage of the gross profit compared to what you paid for [327] that merchandise?

A. No, sir, based upon that selling price, not the cost.

Q. All right, the selling price. A. Yes, sir.

Q. Does it make any particular difference what particular items were sold during that 12 months in order to determine the percentage of gross profit?

A. No; the dealers are there anyway.

Q. You said the figure of \$347,000 in your 1952 tax return of income included your sales of Hunt products plus your other bidding business?

A. Yes, sir.

Q. That would include the money paid by the Government on bids that were accepted and billed?

A. That is right.

Q. On the expense side of the same year's profit and loss statement, both the costs that you had paid Hunt's for their items and the costs that you paid for buying merchandise on bids to the Government?

A. Yes.

Q. Is some of the Government bidding business done on a quarterly basis? A. Yes, sir.

Q. For a quarter starting on the first of January, when are the bids made and accepted? Before or after the first of [328] January?

(Testimony of L. W. Phillips.)

A. They are made as a rule about the middle of November. You get your forms in December and you start delivering in January.

Q. For the first quarter of 1952—the bidding business for the first quarter of 1952, would that reflect bids made before the end of the year 1951?

A. To some extent, yes, sir.

Q. You were asked a question about having to do with higher and lower prices on competing items in commissary stores and what the plan was. Will you state just what your plan was in pricing the Hunt products when you made the sales to the commissary stores, having in mind then the price, what the competition was?

A. Well, as I stated before, if we started in with a new item—are you talking about the placement of an item?

The Court: I think this has been testified to already. I see no particular point in going over it again.

Mr. Rothert: I have an idea that the witness may have misunderstood some of those questions and got a little confused. I may be the one that is confused, your Honor.

The Court: I do not think it is a particularly confusing subject. It is very evident what the witness was endeavoring to do. He was trying to market these commodities. I do not think there is anything very difficult about it. [329]

Mr. Rothert: I have no further questions.

(Testimony of L. W. Phillips.)

The Court: He tried to meet the competition and make a little money for himself.

Recross-Examination

By Mr. Cullinan:

Q. I have just one more question: Did I understand your testimony, Mr. Phillips, to be that you could mark up products 22½ per cent and still be competitive with the chain stores?

A. On Hunt's canned food goods?

Q. Yes.

A. Our books show that we could and we did.

Q. I just wanted to get that clear. That is your testimony, that you could mark up the Hunt products 22½ per cent over what you got it for and still compete with the same Hunt products in the chain stores?

A. Yes, that is right. But you understand that many chains did not carry Hunt's products. We had it at our discretion to pick any brand we found and come up to it and make our profit that way. We had no profit trouble.

Mr. Cullinan: The question has been answered.

Mr. Rothert: Yes. I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Rothert: I will call Mr. Mears, your [330] Honor.

DAVID L. MEARS

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Will you please state your name to the Court?

A. David L. Mears.

Direct Examination

By Mr. Rothert:

Q. Where do you live, Mr. Mears?

A. I live at 25 Diaz Avenue.

Q. What is your business?

A. Division sales manager, Blue Star Foods.

Q. Are you acquainted with Mr. Wellington Phillips?

A. Yes, I am.

Q. Did you at one time work for him or with him?

A. Yes, I did.

Q. Did you know Mr. Phillips in 1951?

A. Yes.

Q. Was there any occasion when you were present when Mr. Phillips had a discussion with Mr. Flynn of the Hunt Foods Company?

A. Yes.

Q. When did that conversation take place?

A. Some time in the fall of 1951.

Q. At the time of this conversation were you working for Mr. Phillips?

A. No, I was not. [331]

Q. Where did this conversation take place?

A. Took place in their offices in Hayward, in Hunt Foods.

Q. How did you happen to be there when Mr. Phillips was there in Mr. Flynn's office?

(Testimony of David L. Mears.)

A. At that time we were perhaps going into a dented can business, the sale of dented merchandise to the restaurant trade here and around the Bay Area.

Q. Did you meet Mr. Phillips there or did you go with him? A. No, I went with him.

Q. At that time did you have anything to do with Mr. Phillips' business?

A. No, I did not.

Q. Was there anyone else present in the conversation besides yourself, Mr. Phillips and Mr. Flynn?

A. I think Mr. Ed Seiger was there on occasion.

Q. Will you explain what you mean by "on occasion"?

A. I think he came in and out of the business a couple of minutes at a time, two or three minutes at a time.

Q. While you were there was this dented can business discussed?

A. Discussed between Mr. Flynn and myself?

Q. Yes. A. Yes.

Q. While you were there was there any discussion between Mr. Phillips and Mr. Flynn about Mr. Phillips' business? [332] A. Yes.

Q. Will you tell the Court what you recall about the conversation you overheard between Mr. Flynn and Mr. Phillips about Mr. Phillips' business?

A. Well, at that time Mr. Phillips was sole owner of this company——

(Testimony of David L. Mears.)

The Court: No, just relate what the conversation was.

A. Oh, just that the conversation was Mr. Phillips was interested in the selling of canned goods to the commissary bases, and the sale of Hunt Foods in particular, Hunt canned goods to the commissary bases, and at that time I believe Hunt salesmen were calling frequently upon the commissaries, but the volume of sales was not as extensive as it might have been, and as Mr. Phillips' business is primarily dealing with the Army and Navy installations, it was felt that the volume of business could be considerably improved.

The Court: Are you stating now what somebody said there or is this just your conclusion as to the nature of Mr. Phillips' business with the Hunt Company?

A. The conversation was, sir, that the business could be improved by the use of Mr. Phillips, with the use of Mr. Phillips' services, yes, sir, and I believe somewhere in the conversation the question of a point system, which Hunt salesmen were working on at that time, was brought up, and that, although Mr. Phillips was selling directly to [333] the commissaries, the particular salesman would still receive credit for the sale within his territory. Basically that was the gist of the conversation at that time.

Q. I want you to think if you can think of anything else that was said in the conversation about anything at all.

(Testimony of David L. Mears.)

A. I think during the conversation it was mentioned that Mr. Phillips would have to sell at approximately the same prices or at the same prices that Hunt salesmen were currently selling to the commissary stores, and that they would have to remain at that price for a relative period. It was quite obvious that you could not go into a commissary and immediately raise the prices just because someone else had taken the line over.

Q. Was there anything else said in that connection?

A. I believe the conversation did take place between Mr. Flynn and Mr. Phillips to the effect that it would be—Mr. Phillips would have to sell at approximately the same prices that Hunt Foods were selling at at that time and a small differential between his costs and the sales price would mean that he would have to be selling at approximately or at his costs or at a slight profit. This would have to continue for a period of one or two years, and then following that time another relative period in which he could gradually take a markup to recover some of the losses, show a profit, or break even during that particular period. [334]

Q. Who was it that made the statement you just made in the conversation, if you remember?

A. I believe it was just a general discussion that took place between the two men.

Q. Do you recall whether or not the subject that Mr. Phillips——

Mr. Cullinan: Just a minute, now, if your Honor

(Testimony of David L. Mears.)

please. I object to counsel leading the witness to what else was said there to ask him for the conversation.

Mr. Rothert: I think it is not objectionable in mentioning the subject of possible conversation.

The Court: I can't tell whether it is leading until the question is asked. Complete the question.

Q. (By Mr. Rothert): Do you recall, Mr. Mears, whether or not the subject of Mr. Phillips' existing business that he had at that time was mentioned in the conversation?

Mr. Cullinan: I will object, if your Honor please, to the leading of the witness.

The Court: I do not know how it can be leading unless you put the answer in the mouth of the witness in some way. I know attorneys always make that objection, that a question is leading. The attention of the witness is directed to a subject matter. I do not know how it would be leading in the sense that it suggests an answer to the witness.

Mr. Cullinan: I should say, your Honor, my objection is [335] that the question is leading and suggestive.

The Court: He is asking him whether a certain subject was discussed. The witness can answer yes or no to that. But if you ask the witness did you say thus-and-so in the conversation, then you put something into his mouth and it is a little different. But I have heard this so many times, I do not attach credence to it. You ask a witness to state a conversation and he gets up on the witness stand—

(Testimony of David L. Mears.)

and maybe he doesn't remember everything at the moment—and you have to prod him a little bit. As long as you do not put words in his mouth and you direct his attention to a general subject matter, I do not see any harm. I never believed the only question you could ask him is was there anything else said. I will overrule the objection.

Mr. Rothert: Will you answer that, Mr. Mears?

(Question read.)

A. Yes, it was.

Q. (By Mr. Rothert): What do you recall was said on that subject?

A. Oh, basically, that Mr. Phillips was doing, I think, primarily a bidding business at that time and it would take considerable——

Mr. Cullinan: Excuse me, your Honor. May we have the witness tell who said what?

Q. (By Mr. Rothert): If you can, identify the person who said [336] whatever you are stating was said.

A. That is a little difficult at this time, your Honor, five or six years later.

The Court: You do not remember who said what?

A. No, sir.

The Court: Well, finish the answer.

A. That Mr. Phillips was doing primarily a bidding business at that time, that he would have to spend a considerable amount of time in calling on the commissaries, talking to the commissary

(Testimony of David L. Mears.)

officers, certainly a time-involving proposition, and that as a result, why, the business that he had at the time would either suffer—due to the amount of time involved in calling upon the commissaries.

Mr. Rothert: I have no further questions.

Cross-Examination

By Mr. Cullinan:

Q. Mr. Mears, to the best of your recollection have you told us the whole conversation and all subjects that were discussed at that meeting?

A. Well, this took place over a series of meetings, two or three.

Q. This is not a particular one meeting?

A. What I am relating is the gist of a couple of conversations, yes.

Q. How many conversations, do you know?

A. I think I was present on either two or [337] three.

Q. Can you tell us approximately when those two or three conversations were?

A. Some time in the fall of 1951.

Q. So none of the matters that you have mentioned can be pin pointed to any particular meeting?

A. Principally, yes.

Q. Which meeting would that be? The first time, second time——

A. I mean that would be difficult to tell at this time.

Q. Was Mr. Steiger present at most of those

(Testimony of David L. Mears.)

meetings? A. No, I don't think he was.

Q. It is the usual practice, is it not, for a jobber to sell at low prices at the start when he is starting out with a product?

The Court: That is pretty general, counsel.

Q. (By Mr. Cullinan): Is it the custom and usage in the industry with respect to the appointments of jobbers how long they are appointed to act?

Mr. Rothert: I will object to that. It calls for the witness' conclusion and opinion.

The Court: It is not part of the direct examination. The witness is only asked as to a conversation he heard, counsel, unless you make him your witness for some other purpose. [338]

Q. (By Mr. Cullinan): Was Mr. Phillips told in your presence during your conversations that he was appointed a jobber to act for Hunt's or did you hear that later?

A. Would you mind repeating that again?

Q. At any of these meetings when Mr. Flynn was present and you were present, was Mr. Phillips told by Mr. Flynn that he would be a jobber for Hunt's or did you learn of it later?

A. No, I think it received his approval.

Q. Flynn's approval?

A. Flynn's approval, yes.

Q. In your presence? A. Yes.

Q. Do you remember anything that Mr. Flynn said about the appointment as a jobber at that meeting?

(Testimony of David L. Mears.)

A. Do you mean do I remember him saying something to Mr. Phillips that "you are hereby appointed a jobber"?

Q. Yes.

A. Well, these things are just not said. It is an accumulation. It is an assumed fact after a conversation.

Q. You have talked to Mr. Phillips, have you not, Mr. Mears, in the last year or so about this litigation, or, rather, Mr. Phillips has talked to you on occasions, hasn't he?

A. We have discussed it, yes.

Q. And in those conversations with him he has mentioned, has he not, in those conversations that he was going about, [339] when he started with Hunt's, he knew he was going to suffer for one or two years by selling at low prices?

A. You mean in the course of the last year?

Q. Yes. A. No.

Q. Didn't he review the situation with you?

A. We had talked about it, yes.

Q. At the time that you were down to see Mr. Flynn you were going into the restaurant supply business and Mr. Phillips was going to have some connection with that business, wasn't he?

A. Well, he was a more or less consulting agent, if you want to call it that, gave me his advice as to how to proceed in the restaurant business, yes.

Q. He was going to be a consultant for you in your business? A. That is right.

Q. And in 1953 were you employed by Mr. Phil-

(Testimony of David L. Mears.)

lips? A. Yes, in 1953 I was.

Q. You were employed by Mr. Phillips for the whole year of 1953?

A. For the whole year, yes, I believe I was.

Q. Mr. Steiger was present on some occasions when these matters that you have testified to were discussed? A. That is right. [340]

Mr. Cullinan: That is all.

Redirect Examination

By Mr. Rothert:

Q. When you worked for Mr. Phillips did you work on the Hunt line or something else?

A. No, I worked on something else.

Mr. Rothert: I have no further questions, your Honor.

Mr. Cullinan: I have no further questions.

The Court: That is all.

(Counsel consulted with each other.)

Mr. Cullinan: I am trying to shorten something up, your Honor, if you will indulge us a moment. If your Honor please, with the permission of Mr. Rothert and with your permission I have another witness who will be about five minutes.

The Court: That is all right. Put him on.

WARD COUSINS

called as a witness on behalf of the defendant;
sworn.

The Clerk: Please state your name to the Court.

A. Ward Cousins.

Direct Examination

By Mr. Cullinan:

Q. Mr. Cousins, where are you employed?

A. Libby, McNeill & Libby.

Q. How long have you been with Libby, McNeill & Libby? A. 33 years.

Q. What is your position with Libby, McNeill & Libby? [341]

A. Sales manager, California Fruit Division.

Q. How long have you had that position?

A. Five years.

Q. Do you know the plaintiff, Wellington Phillips? A. Yes, I do.

Q. Did you know Wellington Phillips in 1951?

A. Yes, sir.

Q. At any time in 1951, to your knowledge, was Mr. Phillips considered by Libby, McNeill & Libby as a sales agent, broker or in any other capacity?

Mr. Rothert: I am going to object on the ground that calls for the witness' conclusion and opinion. There may have been other officers or representatives of Libby, McNeill & Libby that could have talked with Mr. Phillips and it would be this man's conclusion as to whether or not no one in the company had talked to him.

(Testimony of Ward Cousins.)

The Court: What is it that you want to bring out, counsel?

Mr. Cullinan: Here is what I want to bring out, your Honor: The plaintiff has testified that at the time in 1951 when he had these conversations with Libby, McNeill & Libby they were actively trying to get him to take over a similar type of work, and that he told them that he might lost the Libby account if he didn't get this one.

The Court: I do not have a distinct recollection of that testimony. Is that correct?

Mr. Rothert: Substantially that, that he told Mr. Flynn that he had talked to Libby, McNeill & Libby about a similar arrangement but nothing had materialized.

The Court: What do you want to do?

Mr. Cullinan: I have brought the sales manager from Libby, McNeill & Libby to testify there wasn't any.

The Court: That is a purely collateral matter. What bearing has it on this?

Mr. Cullinan: If it is agreed that it is collateral, then I won't pursue the subject. I would have had this job but for this—that point.

Mr. Rothert: No, we are not contending that we have changed our position to our detriment by giving up a Libby account in order to take the Hunt account. We are not making that contention.

The Court: That probably was trade talk. Is that what you would call it? Is that the point of this testimony?

(Testimony of Ward Cousins.)

Mr. Rothert: I think it amounts to more than puffing, but I do not think it has the significance that counsel attaches to it.

The Court: Is that all you want to bring out from this witness?

Mr. Cullinan: The second point is this:

Q. Mr. Cousins, is there in the trade or business any custom or usage with respect to whether sales agents and brokers [343] are assured of selecting any particular period of time?

Mr. Rothert: I am going to object to that as incompetent, irrelevant and immaterial.

The Court: I do not see the materiality of that.

Mr. Cullinan: I was getting to that. A custom and usage may explain the actions of the parties, and if the custom and usage is that these agreements are terminable, that is one thing.

The Court: I am afraid the people who framed the bill of rights would rise up in horror to hear you say that, because no man's property would be safe if his relations were to be determined by what somebody else's custom and practice was.

Mr. Cullinan: The question here is whether the parties contracted.

The Court: The question here is what arrangement the parties made. They have made an arrangement that was customarily made by other persons and they may not have, but I do not see what custom and practice has to do with it. I mentioned yesterday that so far—I have not heard all the evidence, of course—the three parties made a contract for

(Testimony of Ward Cousins.)

a specific period of time, or they made a contract in which no time was specified, or they made a contract that was revocable at the will of either party at any time.

Mr. Cullinan: Yes. [344]

The Court: That is a question of fact. It depends upon what they said.

Mr. Cullinan: Or they made a contract that was the normal and usual type of contract made in the business under similar circumstances.

The Court: That, of course, would involve something like we do in an antitrust case. We would have to make an inquiry as to all the practices in that regard in various enterprises at various times and covering various commodities. I am afraid we would get involved in a very complicated situation there. I would hold that that is incompetent in this case.

Mr. Rothert: May I ask another question, if your Honor please, of this witness?

Mr. Cullinan: There hasn't been any direct yet.

The Court: Are you going to open it up again? You did that once before.

Mr. Rothert: I will again if I think I can make a point.

The Court: I am not meaning to be critical, but there isn't any question now.

Mr. Rothert: It is merely on his position with the company and the setup with the Libby, McNeill company.

(Testimony of Ward Cousins.)

Mr. Cullinan: If your Honor please, there has been no direct examination at this time. [345]

Mr. Rothert: Other than who he is, what job he holds, and for how long.

The Court: You can ask him questions about that, of course, even though there is no testimony as to this case. Ask him what you want and I will rule on it.

Cross-Examination

By Mr. Rothert:

Q. In your position as sales manager, did you have under you men who had charge of different districts?

A. No; I had charge of men under me in charge of various product divisions. I do not have charge of sales through a sales organization. I have charge of sales of our products. It is rather complicated; if you want me to tell you about it, I will.

Q. You do not have charge of the sales organization, is that what you said?

A. That is correct.

Q. Who is Mr. Steward Smith of your company?

A. He is one of our branch salesmen.

Mr. Rothert: I have no further questions.

The Court: That is all you want of this witness?

Mr. Cullinan: That is all. Thank you, Mr. Cousins.

The Court: Will you gentlemen tell me how many more witnesses there are to be in this case?

Mr. Rothert: I have the accountant who kept the books and records of Wellington Phillips and he will be short. [346] I would like to ask a few questions of Mr. Steiger and Mr. Miller of Hunt Food Company as adverse witnesses and that would be all I would have.

The Court: Will you have many witnesses in addition to those who have already testified?

Mr. Cullinan: One other. I have Mr. Steiger and Mr. Miller that Mr. Rothert is going to call.

The Court: Can we resume at 1:30 tomorrow afternoon? I am asking you these questions because there are some other matters I have been asked to consider and I do not know whether I can do it on Friday or not. Do you think you could conclude the testimony tomorrow afternoon? Is there a chance?

Mr. Rothert: I think there is a reasonable chance.

Mr. Cullinan: Lawyers always say yes.

Mr. Rothert: Does your Honor mean you would not be able to hear this case on Friday?

The Court: No, I can hear the case if you gentlemen do not finish tomorrow, but there is some other matter where they would like to be heard.

Mr. Rothert: I do not mean to string it out, but if we were not going to be here Friday I would make other plans for Friday myself.

The Court: No, I will finish this case. I was trying to figure out my own plans. [347]

Mr. Rothert: I think there is an opportunity of finishing tomorrow if we start at 1:30.

The Court: We will take a recess until 1:30.

(Whereupon, an adjournment was taken to tomorrow, Thursday, December 1, 1955, at 1:30 o'clock p.m.) [347-A]

December 1, 1955, at 1:30 P.M.

The Clerk: Phillips versus Hunt Foods, further trial.

Mr. Cullinan: Ready.

Mr. Rothert: Ready, your Honor.

I would like to call Mr. Norman Willey.

NORMAN C. WILLEY

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name to the Court.

A. Norman C. Willey—W-i-l-l-e-y.

Direct Examination

By Mr. Rothert:

Q. What is your business or profession, Mr. Willey? A. I am a public accountant.

Q. Have you had anything to do with the books of Wellington Phillips Co.? A. Yes, I have.

Q. Have you prepared financial statements covering the operations of that company's business during the years 1951, '52 and '53?

A. I prepared financial statements for '51 and '52 and tax returns for all the years. I don't believe I prepared a financial report for '53, but I did prepare the tax return.

Q. Are you connected in any way with the Over-

(Testimony of Norman C. Willey.)

seas Finance [349] Trading Company at the present time? A. I am.

Q. In what capacity?

A. I am an officer and director.

Q. When did you first become an officer of that company?

A. My recollection—to my recollection would be in either May or June of 1952.

Q. Prior to June of 1952 did you do any work for the Overseas Company?

A. I was their auditor, yes.

Q. And have you been familiar with the accounts between the Wellington Phillips Co. and the Overseas Finance and Trading Company at all times since 1951? A. Yes.

Q. Including 1951 up to date? A. Yes.

Q. I will hand you some tax returns and financial statements for 1951, '52 and '53 of the Wellington Phillips Company and ask you if these are returns or statements that you prepared?

A. Yes, they are.

Q. And did you prepare those after a study or audit of the books of the company?

A. After a limited audit of the books, that is correct.

Q. From a profit or loss standpoint did your audit disclose as to whether the Wellington Phillips Co. made a profit or [350] suffered a loss in 1951?

Mr. Cullinan: If your Honor please, this witness has testified to a limited audit of the books. As far as 1951 is concerned, we are willing to stipulate that

(Testimony of Norman C. Willey.)

we received a summary of the partnership return of income for the year 1951 that was sent to Mr. Church in May of 1952; but as far as this witness being able to tell from a limited audit of the books what the profit or loss of the company is, we would object to his testimony on that ground, that it is incompetent, irrelevant and immaterial, the proper foundation has not been established for his testimony.

Mr. Rothert: I can ask him what he means by a limited audit. The objection only affects the weight of the testimony.

The Court: I would think so. His statement is simply as a result of the examination of the books and records. I don't quite understand what you mean by—the testimony only is what the accountant found to be the status of the concern as to profit and loss from their own records. That is perfectly common accounting testimony.

Q. (By Mr. Rothert): What do you mean by a limited audit?

A. Well, in the sense I sent out no letters of verification to customers or to creditors. I did check the books, footed, posted, made such tests that I could make within a time limitation and satisfied myself within the scope of my work that the figures that I had put on the tax return are correct [351] to my knowledge and belief.

Q. Based on that examination of the books, what did you find was the condition as to profit or loss of the company for the year 1951?

(Testimony of Norman C. Willey.)

A. They made a profit in '51.

Q. And how much?

A. On the basis of this tax return it shows \$15,-
312.61.

Q. To what extent did you audit the books of the company for the year 1952?

A. It would be along the same lines.

Q. The same type of limit audit?

A. That is correct.

Q. And did you make up a profit and loss statement for the company for the year 1952?

A. I did.

Q. And what did you find was the experience of the company in '52 as to profit or loss?

A. Well, in that particular year I filed a tax return. It shows a profit of \$5,239.27, which subsequently was amended on the basis of information discovered later to a loss of \$10,426.49 because of certain invoices representing purchases did not come to my attention until a later date, but they did apply to the year 1952.

Q. So that when you finished all of the auditing that you did and had all the information that you had for the year 1952 [352] was the result a loss of approximately \$10,000? A. That is correct.

Q. Did you make a limited audit of the books for 1953? A. That is true.

Mr. Cullinan: If your Honor please, I will object to any testimony as to the profits or loss for the year 1953 because there is no relationship established in the record as to any loss in the year 1953

(Testimony of Norman C. Willey.)

as shown by the partnership return, no relationship between that loss, if any, and the loss of the Hunt Foods arrangement. They could have lost money for all sorts of reasons, but unless it is established that the only cause of loss in 1953 was the termination of this arrangement, then I think that——

The Court: I think counsel is just offering this for the purpose of showing the status of the business at that time.

Mr. Rothert: That's right.

The Court: The condition at that time might not be a factor at all in any calculations of damages if a breach is shown. I will allow it.

Q. (By Mr. Rothert): What did your limited audit for 1953 show as to whether the company earned a profit or loss and in what amount?

A. According to the tax return, it shows a loss of \$57,883.61.

Q. That is for the entire year?

A. That is for the entire year. [353]

Q. During the period from January 1st of 1952 to May 1st of 1953 did the Wellington Phillips Company pay over or send money to Overseas Trading and Finance Company?

A. Yes, they did.

Q. Did you make a list of the times when the payments were made and in what amounts?

A. Yes.

Q. From the books of the company?

A. Either from their books or from the books of Overseas.

(Testimony of Norman C. Willey.)

Q. And do you have that list with you?

A. Yes, I have this list.

Mr. Cullinan: If your Honor please, if there is any tabulation from the books of Overseas, we will object to it because we don't know anything about it.

The Court: Are they the same?

A. They would be the same, your Honor.

The Court: Then it doesn't make any difference.

Q. (By Mr. Rothert): Will you state when those payments were made and how much?

A. On the basis of this list it shows an amount of \$500 in September of 1952; \$1,000 in October of 1952; \$500 in November of 1952, and another \$500 in November of 1952; \$2,500 in December of 1952, \$350 in January of 1953; \$700 in February of 1953; \$2,000 in March of 1953; another \$2,000 in March of 1953, and \$2,000 in April of 1953. [354]

Q. Do you know what those checks add up to?

A. They should add up to \$12,050.

Q. Did Wellington Phillips Company from time to time borrow money from the Overseas for use in its business?

A. That had been done, yes.

Q. On the first of May, 1953, were you then an officer of the Overseas Company?

A. In May of '53?

Q. Yes. A. Yes, I was.

Q. At any time after May 1, 1953, did the Overseas Finance and Trading Company have funds available to be borrowed by the Phillips Company?

(Testimony of Norman C. Willey.)

Mr. Cullinan: I will object to that, if your Honor please.

The Court: What is the materiality of that?

Mr. Rothert: Well, I think it is material to the question of the ability and opportunity of the Phillips Company after termination to revive the bidding business that it had before.

The Court: Well, I don't think that would have anything to do with the ability, with the question of whether they were willing to give them money or not.

Mr. Rothert: My question was intended to ask for whether or not there was any money available whether they were willing or not. As I understand it, they had capital available if they were willing to lend it to the Phillips Company during an [355] earlier period, but at this time there wasn't any money there whether they wanted to lend it or not. That is my understanding of it. The argument might be made, all they had to do was borrow money from Overseas and get back in the bidding business again, and I want to show that that opportunity was not available.

The Court: Well, I will allow the testimony. I don't quite see what the materiality is.

The Witness: Would you mind repeating that question?

The Court: At that time did the Overseas Company have funds available they could have if they had been willing to loan to the plaintiff here.

A. Well, it is my recollection at that particular

(Testimony of Norman C. Willey.)

period that what funds they did have were definitely tied up in a camera business, with a camera distributor, and they were very active, I know, at that time with the distributor. It would have required a considerable amount of money to finance that camera operation, so I would say that the funds available for other purposes were quite limited at that particular moment.

Q. Do you have a statement of assets and liabilities for the Phillips Company applicable to any part of the year 1953?

A. Only insofar as up here on the tax return.

Q. Where would that be?

A. This would be the balance sheet right here. Here's your [356] assets up here, and your liability side. This is the beginning and end of the year. Your capital accounts are here.

Mr. Rothert: I have no further questions.

Cross-Examination

By Mr. Cullinan:

Q. Mr. Willey, with respect to these payments to Overseas, in 1952 Federal tax liens had been filed against Overseas Trading Company, had they not?

A. I don't remember the exact period, sir, but at somewhere along in there I would say they were, yes.

Q. Don't you remember that on May 16, 1952, a federal tax lien of \$5,673 was filed against Over-

(Testimony of Norman C. Willey.)

seas? A. I don't remember the date, sir.

Q. It was in May, 1952, that tax trouble developed, wasn't it?

A. It could be. It could be.

Q. And you arranged with the Government, did you not, Overseas, to pay that—first, the total tax liability to the federal government of Overseas at that time was in excess of \$20,000, wasn't it—\$27,000?

A. The total tax liability?

Q. Yes.

A. Would that be additional assessments on the excise tax?

Q. The total amount of the tax liens filed.

A. I couldn't tell you right at this moment without looking it up.

Q. Can you tell me that in 1952 tax liens of approximately [357] \$27,000 were filed against Overseas, were they not?

A. All I recall is that there were tax liens; the amounts I don't recall at the moment.

Q. Can you tell us with any degree of accuracy as to whether it was around 25 or \$27,000?

A. Without going back through my files, I couldn't tell you, no. All I can tell you is that there were liens of some kind; the amount I couldn't say.

Q. Do you know that there was a tax lien of \$983 filed on June 10, 1952?

A. There again I don't remember these amounts.

Q. You don't remember?

A. No, I don't.

Q. June 17, 1952, a tax lien of \$5,323; you don't

(Testimony of Norman C. Willey.)

remember that either? A. No.

Q. But you did work out an agreement in 1952 with the Government to pay off these tax liens at the rate of a thousand dollars a month, didn't you?

A. There was an arrangement made with the tax collector's office, yes.

Q. The first of these payments that you made in your direct testimony from Phillips Company to Overseas started in September of '52, didn't it?

A. That is correct. [358]

Q. And that was as I have it here, just briefly, \$500 in September, a thousand in October, a thousand in November? A. That's right.

Q. In the books of Wellington Phillips Company there was a capital account and a liability account for Overseas, was there not?

A. As I recall it, there were, yes.

Q. And on the books funds were transferred back and forth between the capital account and the liability account, were they not?

A. That is my recollection, yes.

Q. Now, in December of 1952—and let me state what my records show and if it isn't right, I can correct it by the books—on December 31, 1952, a journal entry was made, was it not, deducting \$11,400 from the Overseas account in Phillips Company? A. That I don't recall.

Mr. Cullinan: Do you have that journal?

The Court: What are you trying to show: that payments were capital withdrawals?

Mr. Cullinan: Their contention is that they

(Testimony of Norman C. Willey.)

withdrew capital because they needed it in the business now that they had the Hunt account. That is one of their claims for estoppel in the statute of fraud; that they said they were going to withdraw some capital and they did so. And I wanted to show [359] here that these capital withdrawals were mostly bookkeeping entries, and one of them \$11,400 in December '52, most of it went to the Phillips Corporation which had just been formed.

The Court: There has been no testimony here on that. They were testifying as to cash withdrawals. That is all this witness testified to.

Mr. Cullinan: Yes.

The Court: You are referring to some other item. There has been no testimony on that so far. Are you trying to meet something that hasn't yet been presented? It isn't clear to me.

Mr. Cullinan: No, I think the plaintiff testified that on some occasions funds were withdrawn and paid to Overseas but were paid as a debt rather than as a withdrawal of capital.

Mr. Rothert: He said that he put "loan" on the checks.

Mr. Cullinan: He put "loan" on the checks?

The Court: He did what?

Mr. Cullinan: The plaintiff testified that when he paid these checks to Overseas he wrote the word "loan" on the checks.

The Court: I see.

Mr. Cullinan: But he didn't state whether it

(Testimony of Norman C. Willey.)

was a capital withdrawal or a payment on the loan, according to the books.

The Court: Are these the same checks? Are these the checks that were issued in payment of these amounts that the witness has [360] testified to?

Mr. Rothert: They are the same checks, your Honor, I am quite sure; I mean the same checks that the plaintiff testified to.

The Court: All I was trying to find out, Mr. Cullinan, is are you talking about something different in addition to these items of cash that were covered by checks?

Mr. Cullinan: Well, I am trying to find out——

The Court: If you are, there has been no testimony here.

Mr. Cullinan: I am trying to find out whether these checks have been in relationship to the deductions from the capital account and deductions from the liability account in the books of the company.

The Court: You might ask him that.

Q. (By Mr. Cullinan): Do you know whether these checks were charged as the withdrawals of capital or as a deduction on the liability account in the books of Wellington Phillips Company?

A. Without an analysis I don't think I could tell you that; I can only presume.

Q. Well, don't presume. You don't know?

A. I don't know, no, without an examination.

Q. Do you keep the books yourself?

(Testimony of Norman C. Willey.)

A. Which is that?

Q. The Wellington Phillips Company books.

A. Well, I don't actually keep them to the extent that I [361] don't make the entries from the checks or the cash receipts records, but I do foot them, post them to the general ledger.

Q. I see. So all your information from the books stems from whatever Mr. Phillips or somebody else puts in the books; isn't that so?

A. That is roughly it, yes, plus what tests I like to make.

Q. Well, I will ask you this, Mr. Willey, from the income tax returns that you had, is it not a fact that they show at the end of 1951 the Overseas capital in the Wellington Phillips partnership amounted to \$16,202,75? That is in the 1951 return.

A. That's correct.

Q. Yes. Isn't it true also that the 1952 return shows to the end of 1952 Overseas capital in the Wellington Phillips partnership was \$16,422.42?

A. That is on the \$16,422.42, is that the figure?

Q. Yes.

A. That is on the return originally filed.

Q. That was on the return originally filed?

A. Yes.

Q. When was that return filed, that first return of 1952?

A. That would be filed within the time.

Q. Before March of 1953?

A. Well, unless we had an extension of time,

(Testimony of Norman C. Willey.)

either before March or within the extended [362] period.

Q. When was the amended return for 1952——

A. Some time this year.

Q. So just this year. Can you tell us when this year?

A. No, I could not without looking into my file.

Q. Well, the amended return was prepared this year, too? A. Yes, it was.

Q. And the reason for the amendment this year was, you say, that certain invoices hadn't been found or hadn't been entered as of 1952?

A. 1952, that is correct.

Mr. Cullinan: That's all.

Redirect Examination

By Mr. Rothert:

Q. What did the amended return for 1952 show as to the Overseas capital account to Wellington Phillips? A. It shows \$8,589.55.

Q. These checks that you enumerated, they are paid to Overseas starting in September of 1952, were they a loan or were they a capital account, or what were those payments?

A. You mean how were they treated in the books, or what was the intention?

Q. Well, how were they handled in the books?

A. Well, as I recall——

Mr. Cullinan: If your Honor please, how they

(Testimony of Norman C. Willey.)

were handled in the books of Overseas is certainly hearsay and not binding as to this defendant. [363]

The Court: Well, I think that objection is good; the witness hasn't any firsthand information as to the nature of the transaction.

Q. (By Mr. Rothert): Were some of these payments made when you were an officer of the Overseas?

A. Yes, it would be some time during that period, yes.

Q. Were those payments, during the period you were an officer of Overseas Corporation taken by Overseas as a loan?

A. Well, they would be applied against the receivable on the books of Overseas against a debit balance, they would be credited against a debit balance due from Wellington Phillips and Company.

Q. Well, in September of 1952, when the first of these checks was paid, what was the state of accounts between the two companies as to who owed who money, if there was any money owed?

Mr. Cullinan: I think the books are the best evidence of that, if your Honor please. If they had some summary we could look at and check the books or—but I think just an offhand statement of what the balance was at a certain time——

Mr. Rothert: I didn't ask for the balance, asked whether it was a plus or minus.

The Court: I think what counsel is asking for is what was the relationship of the parties.

Mr. Rothert: Yes. [364]

(Testimony of Norman C. Willey.)

The Court: As creditor and debtor between one another, who was the creditor and who was the debtor, if he knows.

The Witness: Actually I don't recall. I wouldn't—I would not wish to say with any assurance which—who had the debit and who had the credit.

Q. (By Mr. Rothert): Was there any time when, during this period we are talking about, the balance of accounts between the two companies showed that Phillips Company was a creditor and Overseas owed them money as a net balance?

Mr. Cullinan: I will object to that as incompetent, irrelevant and immaterial, any time one owed the other some money.

Mr. Rothert: It's preliminary, depending upon what the answer is.

The Court: Did you have any active part in this Overseas Company?

The Witness: Yes, I do, sir.

The Court: You were familiar with their business transactions?

The Witness: Yes.

The Court: With the Phillips Company?

The Witness: Yes, I am, sir.

The Court: You ought to know, then, whether your company owed them money or their company owed you money. It's a very simple matter. Can you answer it or not? [365]

The Witness: Well, to my recollection, there were times when we owed them money, there were times when they owed us money.

(Testimony of Norman C. Willey.)

The Court: You mean you borrowed money from them, too?

The Witness: Well, the account on one set of books would show that—take, for instance, the account on the books of Overseas, we would have a credit balance, very possibly, of money owing to Wellington Phillips and Company; at other times it could be the other way. That is my recollection.

The Court: Well, all I was trying to find out was whether or not the causal relationship between the companies was such that you were lending money to them or were they lending money to you?

The Witness: Primarily we were lending them money.

The Court: At times you borrowed money from them?

The Witness: It could be so, sir.

The Court: You don't know?

The Witness: I don't recall; no, I do not recall these balances.

Q. (By Mr. Rothert): Well, when you gave that answer did you take into consideration the original capital or money which Overseas placed as a limited partner in the Wellington Phillips Company?

A. Well, of course, that was left undisturbed, the capital account at the very beginning. I frankly couldn't state who [366] owed who money at a certain series of times without actually going into the books and making the examination.

(Testimony of Norman C. Willey.)

The Court: Well, the Overseas Company had a capital interest in this company?

The Witness: That is correct.

The Court: A special partner, is that right?

The Witness: That is correct, sir.

The Court: And was that carried in the capital account of the Phillips Company, there was set up the capital interest of the Overseas Company?

The Witness: That is correct, sir.

The Court: Now, did they withdraw, did the Overseas Agency withdraw any part of their capital account?

The Witness: Not the capital, but this liability account which represented advances and returns of these advances.

Q. (By Mr. Rothert): When you testified about the debtor-creditor relationship, were you speaking only of the liability account and not the capital account?

A. I am speaking of the liability account.

Q. Was the liability account an account that Phillips Company used currently in its business and for instance——

Mr. Cullinan: Just a moment, I don't understand——

Mr. Rothert: I will withdraw that.

The Court: Gentlemen, I think we have spent enough time on that. [367]

Mr. Rothert: I have no further questions.

The Court: This should be a matter of book-keeping records, that would show, if you want——

Mr. Rothert: I have no further questions.

Mr. Cullinan: I have no further questions.

The Court: That is all, sir.

(Witness excused.)

Mr. Rothert: I would like to call Mr. Steiger.

EDWARD STEIGER

called as an adverse witness, by the plaintiff; sworn.

The Clerk: Will you please state your name to the Court, sir.

The Witness: Edward Steiger.

Mr. Rothert: I am calling Mr. Steiger as an adverse witness, your Honor.

Direct Examination

By Mr. Rothert:

Q. You are an employee of the Hunt's Food Corporation, are you? A. That's right.

Q. What is your position now?

A. Assistant District Sales Manager.

Q. And did you hold that same position at all times since the summer of 1951? A. Yes.

Q. Prior to the time that Phillips Company started calling on the commissary stores in Northern California and selling Hunt products to them, how many salesmen did your company have who regularly called on those commissary stores?

A. Can I take a moment?

The Court: Sure.

Q. (By Mr. Rothert): Or approximately.

(Testimony of Edward Steiger.)

A. We used roughly three salesmen to a very limited extent.

Q. You mean they had a lot of other business in addition to the commissary stores?

A. That's right.

Q. Well, are you familiar with the—Well, were all of the commissary stores in Northern California contacted by your salesmen during the summer of 1951 or were there some that weren't called on?

A. I could answer that question by saying that to my knowledge all of the commissary stores were being called on regularly where it appeared that those commissary stores might buy, might purchase our products. There could have been commissary stores on whom our salesmen hadn't called too recently due to the fact that they might not be able to sell them.

Q. Did your salesmen in making sales to the commissaries in the summer of 1951 sell at the jobber price, at the Hunt's jobber price? [369]

A. No, they sold at a price slightly above the jobber's price.

Q. Well, is it based on f.o.b. Hayward plus a certain additional amount?

A. Yes.

Q. During the time that Wellington Phillips Company called on those commissary stores for your company—I mean, selling Hunt products—at what price did Hunt's sell to Phillips?

A. Generally speaking, at an identical price.

Q. Identical with the price that the salesmen

(Testimony of Edward Steiger.)

had previously been selling to the commissary stores; is that what you mean by identical?

A. Yes.

Q. Generally speaking? A. Right.

Q. Did you call on some of the commissary store purchasing officers with Mr. Phillips in the early part of 1953? A. Yes.

Q. Had you called on those stores, some of those commissary stores with Mr. Phillips during 1952 at all?

A. I don't recall; I don't recollect. I don't believe that I did.

Q. You didn't visit all the commissary stores with Mr. Phillips, did you? A. No. [370]

Q. In those commissary stores that you visited with Mr. Phillips, did you find that some commissary stores were then buying Hunt's products that had not been buying Hunt's products through your salesmen in the summer of 1951?

A. Well, that is a little difficult to answer, because to give you an answer I would have to remember seeing invoices covering sales.

Q. All right. Was it volume of sales that Mr. Phillips made to the commissary stores during the time he—between December 1, 1951, and into April of 1953, greater in volume than the volume that your salesmen had been selling prior to that time?

A. I am quite sure it was.

Q. Was it as much as double the volume?

A. That I couldn't say accurately. I would have——

(Testimony of Edward Steiger.)

Q. Do you recall at any time whether you told Mr. Phillips he had doubled the volume?

A. I could have; based on the bases I have visited.

Q. Do you recall visiting Camp Mather?

A. Yes.

Q. The commissary there, I mean, of course, with Mr. Phillips?

A. With Mr. Phillips.

Q. That was in about March of 1953?

A. Yes. [371]

Q. And did you find that the commissary at Camp Mather, that most of the Hunt line was then being handled by the commissary?

A. At Mather Field?

Q. Yes.

A. The question in my mind is, was it Mather Field or was it not the base where Mr. Phillips was promised the business, or if that base already had our representation.

Q. You mean, it may be when you were there the purchasing officer stated that they would take on practically the entire Hunt line?

A. Yes, it could be that or it could be that they had our products. I believe that a young lieutenant stated that he was—he had checked over our items and thought that he would handle. I believe that's what I recall.

Mr. Rothert: Do you keep a list you could tell whether there is an April 1, 1953, letter as a Defendant's exhibit?

(Testimony of Edward Steiger.)

The Court: As a defendant's exhibit?

Mr. Rothert: I'm sure that it isn't a plaintiff; I am quite sure it isn't a plaintiff's exhibit. I don't think it has been introduced yet, but I was checking.

The Court: There is April 15.

Mr. Rothert: Yes, I am familiar with that one. These are in chronological order in the exhibit file?

The Court: There is no April 1st in my record.

Q. (By Mr. Rothert): I will show you, Mr. Steiger, a photostatic [372] copy of a letter from you to Mr. Larry Phillips, Wellington Phillips Company, dated April 1, 1953.

(Showing letter to witness.)

The Court: What is the question, counsel?

Q. (By Mr. Rothert): You remember seeing that letter, Mr. Steiger? A. I do.

Q. And does the last paragraph of the letter refresh your recollection at all as to whether at Camp Mather, Mather Field, you found the Hunt line was already in, or that the purchasing officer merely say that he would put the Hunt line in?

A. I still can't tell you accurately whether the full Hunt line was in the Mather Field or if it was in a limited way.

Q. Yes.

A. And the promise from a purchasing officer was made to put the full line in.

Q. How long have you been in the sales end of the Hunt's business?

A. With Hunt's Foods, Inc.?

Q. Yes, Hunt Foods, Inc.

(Testimony of Edward Steiger.)

A. Almost ten years.

Q. And were you in the canned food business before that? A. In a limited way, yes.

Q. In sales, the sales part of it? [373]

A. Sales and some production.

Q. Well, from what you observed in making visits to the commissary stores with Mr. Phillips, it was your opinion, wasn't it, that he had made a great deal of progress in his selling program?

A. Yes.

Q. Was it your opinion at that time that he was going to succeed in getting the full Hunt line into a number of commissary stores?

Mr. Cullinan: I will object to that, your Honor, as calling for a conclusion and opinion of this witness, what he thought the plaintiff might do as some time in the future.

The Court: It is already in evidence; a letter to that effect was introduced already.

Mr. Rothert: More or less says that in this letter.

The Court: No, another letter.

Mr. Rothert: Yes, I know. I think this man is an experienced man in the sales end of the business, qualified to have an opinion if he has one.

The Court: It is already in evidence. I don't know why you want to ask it again orally, unless it is denied.

Q. (By Mr. Rothert): Did you find on these visits to the commissary stores that several com-

(Testimony of Edward Steiger.)

peting lines of canned good products had been eliminated from competition with Hunt's lines? [374]

A. Yes, I did.

Q. I show you Plaintiff's Exhibit No. 5 and ask you if you recall that letter, sending that letter to Mr. Phillips.

Mr. Cullinan: What date is that, Mr.—

Mr. Rothert: April 16th, 1953.

The Court: What question have you?

Mr. Rothert: I am sorry.

Q. You recall that letter? A. I do.

Q. And the account attached to it?

A. I do.

Q. At the time of this letter had Mr. Phillips reduced the amount of money that was kept on the Hunt's invoices to him from the amount that had been owing prior to the writing of that letter? [375]

Mr. Cullinan: If your Honor please, there is no showing that this witness knows how much at any given time the balance actually due by the plaintiff to Hunt Foods is. The records of Hunt or the Plaintiff would be the ones to establish that.

The Court: Is that the letter to which the statement is attached?

Mr. Rothert: Yes; it says: "Appears to be in much better shape than previous statements."

The Court: What do you want the witness to say? To contradict that statement in some way?

Mr. Rothert: No.

The Court: I don't know just what it is that you are trying to show.

(Testimony of Edward Steiger.)

Q. (By Mr. Rothert): Well, between the time you wrote this letter on April 16th, 1953, discussing the state of Mr. Phillips' account until May 1st of '53, did you at any time talk to Mr. Phillips about the state of his account?

A. As I recall, I did.

Q. You say you did. During that two weeks period?

A. Would you state that date again?

Q. From April 16, '53, until the 1st of May.

A. Let me change that statement to I don't recall contacting him over the payment of any invoices due or past due. I don't recall.

Q. You mean after the date of that letter or during that [376] period only?

A. During that period.

Q. Did you talk to Mr. Phillips and inform him that he was no longer going to be able to sell to the commissaries?

A. I don't recall that I told him that definitely he wouldn't be able to sell the commissaries.

Q. Do you recall that you mentioned the subject of his going to the commissaries in a conversation during the month of April, '53?

A. Yes, I talked to him in April, I must have, and selling the commissaries must have been in the conversation.

Q. This is the time when his selling terminated, wasn't it—about the time it terminated?

A. I understand about that time that it was terminated.

(Testimony of Edward Steiger.)

Q. And did you talk to him on the telephone?

A. I talked to him on the telephone.

Q. And did you say in substance that he would no longer be allowed to sell to the commissary stores?

Mr. Cullinan: Why don't you let the witness say what he said without asking the substance of it? I think that is a conclusion of the witness. Let him say what was said.

Mr. Rothert: Well, I may, if I wish, ask leading questions, I believe, your Honor.

The Court: Overruled.

Q. (By Mr. Rothert): Well, what did you say to Mr. Phillips [376] when you called him up?

A. When?

Q. Sometime in late April, 1953, and about the time when his selling to the commissaries terminated.

A. I hope I am answering your question correctly. I don't recall.

The Court: Don't worry about whether you hope; just tell us what happened, please. What did you say to him over the telephone, if you remember?

A. Your Honor, I am trying to answer it to the best of my ability. I don't recall telling him whether or not he would continue selling the commissaries.

Q. (By Mr. Rothert): I am just asking you what you said.

A. I don't remember what I said; we had quite a few conversations.

(Testimony of Edward Steiger.)

Q. In other words——

The Court: Did you have any discussion with Mr. Phillips at all about the discontinuance of his relationship over the telephone in or about that time? A. Yes, I must have, your Honor.

Q. I don't want you to tell me what you must have. If you don't recall it, it is no crime to say you don't recall it. What we want to know is did you have any conversation on that subject?

A. Yes, your Honor, I did. [378]

The Court: All right; what was said? That is what counsel wants to know.

A. I believe the conversation emanated from Mr. Phillips advising that he had heard rumors and so on and so forth about the lines being taken away from him.

Mr. Cullinan: I can't hear. Would you speak up?

A. Yes.

The Court: Read what he said so far.

(Answer read.)

The Court: And then did you say anything?

A. Yes, sir, your Honor, I said that I didn't know and had no official advice or information on that subject.

Q. (By Mr. Rothert): Did you at some time get official advice or information on the subject?

A. I don't recall.

Q. Were you present at any meeting where Mr. Phillips and Mr.——

(Testimony of Edward Steiger.)

The Court: For my information will you stop there just a moment, counsel?

Mr. Rothert: Yes.

The Court: You are the assistant district sales manager of the company. Now you must have learned, the sales being in your charge, what happened to the Phillips account at some time or another.

A. I do, sir, very definitely, but I didn't tell Mr. Phillips [379] prior to his being advised by my superior.

Q. I understood that, but the counsel asked you whether you didn't learn about it and you said you didn't know. All I was trying to inquire was—I think you may have been mistaken about it, because you must have learned about it at some time or other.

A. Yes, I heard of it, but I didn't know until my superior informed me in his presence.

Q. (By Mr. Rothert): Were you present at any meeting that Mr. Miller and Mr. Phillips attended in which Mr. Phillips was told that his selling to the commissaries was terminated?

A. Yes.

Q. Where was that meeting held?

A. In my office in Hayward.

Q. Now before that meeting, had your superior told you that Mr. Phillips was going to be terminated?

A. Well, he probably told me maybe an hour and 15 minutes before Mr. Phillips arrived.

(Testimony of Edward Steiger.)

Q. When did that meeting take place?

A. The date escapes me at present. There is a record of the date. I wish I could answer it accurately, but I can't.

Q. Was it about the first of May, 1953?

A. The first of May of 1953? I am still guessing, but that is somewhere near the time.

Q. Was it Mr. Miller in that meeting who told Mr. Phillips [380] that it was terminated?

A. Yes.

Q. Now in that meeting there was no mention made of Mr. Phillips' account, was there?

A. Well, I would say that there was.

Q. Well, did Mr. Miller in that meeting tell Mr. Phillips that the company had made arrangements with Francois Schwarz Company to handle sales to the military and that therefore he wouldn't be able to sell to the commissary stores?

A. In essence that is about what he said, I believe.

Q. Mr. Miller didn't state in substance that Mr. Phillips' account was a reason for the termination, did he?

Mr. Cullinan: If your Honor please, I think he ought to ask for the conversation, not using counsel's words: did he state that this was a reason. The whole conversation should come in. I think counsel shouldn't try to characterize any part of the conversation.

The Court: Well, what statement was made by

(Testimony of Edward Steiger.)

Mr. Miller as to the reasons for discontinuing the arrangement with Phillips, as you recall?

A. Well, your Honor, as I recall, Mr. Miller stated that our salesmen originally had handled the commissaries; that they had done a pretty good job, but they hadn't actually, well, gotten the sales volume that they should have, that is, in the company's opinion they should have. Therefore, a change [381] was made and Wellington Phillips Company was selected, and at this time the company again felt that a better job could be done and another selection had been made; that—it is kind of difficult to remember it all, but that would be roughly what was said. There was a mention of the account that it was continually past due, or words to that effect. That is as close as I can remember, your Honor.

Q. Well, did this statement of Mr. Miller surprise you?

A. Well, he had told me some time that day prior to Mr. Phillips being present at the meeting.

Q. When he told you previously, then, did his statement that they were going to change the relationship surprise you?

A. No, sir, it didn't.

Q. You had just got through writing him a very glowing letter to Mr. Phillips about his business. I should think it would have surprised you, wouldn't you?

A. May I say this: that perhaps I am not the best letter writer in the world. I believe I am a good

(Testimony of Edward Steiger.)

salesman or sales manager, and the intent in my letter was to create enthusiasm, to maintain enthusiasm, on the part of whoever sells for us, our own salesmen or representatives. So in my opinion, my statements were relative to, No. 1, the job that our salesmen had done, which wasn't as good as Mr. Phillips; and, No. 2, to the bases on which we had been. I had not been on the other bases, and I understand—that is, I remember that we [382] were not selling the other bases. So my letter was glowing for several reasons.

The Court: Any other questions?

Mr. Rothert: Yes, I have, your Honor.

Q. I will show Mr. Steiger a copy of a letter and ask him if he recalls sending that letter to Mr. Phillips. Do you recognize that letter?

A. I do.

Mr. Rothert: This is another letter which I would like to introduce as plaintiff's next in order.

The Clerk: Plaintiff's Exhibit 10 introduced and filed into evidence.

Mr. Rothert: May I read this letter or should I pass it up to your Honor?

The Court: Pass it up. You can go on to something else.

Mr. Rothert: I want to ask him a couple of questions about that.

The Court: Go ahead, then.

Q. (By Mr. Rothert): When you wrote this letter of March 6, Plaintiff's Exhibit 10. Mr. Steiger, didn't you feel that Mr. Phillips had been

(Testimony of Edward Steiger.)

very successful in handling the commissary accounts?

A. The letter was written after I called on the accounts with Mr. Phillips and the letter pertains to the accounts on which I called with Mr. [383] Phillips.

Q. Yes. And weren't you amazed with the success he had had in handling those particular commissary accounts? A. Yes.

The Court: Isn't that letter in evidence already?

Mr. Rothert: I don't think so.

The Court: The March 6th letter is Plaintiff's Exhibit 4.

Mr. Cullinan: It is Exhibit 4.

Mr. Rothert: Well, I am sorry; it is, yes.

The Court: Strike out that; we don't need two exhibits the same.

Q. (By Mr. Rothert): During the time that Mr. Phillips was selling Hunt's products to the commissaries did you ask him to take over the Hamilton Field account to replace one of the salesmen who had been doing it up to that time?

A. I did, but of course, that is relative to another subject.

Q. Well, for a part of the time after Phillips started, one of your salesmen was handling the Hamilton Air Force commissary; is that true?

A. That is right.

Q. And then you asked Phillips to take it over in place of the salesman?

(Testimony of Edward Steiger.)

A. Once we had paved the way with the purchasing officer, yes.

Q. And you turned over some sales that the salesman had already made, you turned those over to Mr. Phillips, didn't [384] you?

A. I seem to recall that we took a sale that the salesman had made and turned it over to him.

Q. And your company sent the goods and billed Mr. Phillips for the amount?

A. I don't recall that. It could be; I don't recall it.

Q. Did you go to Mare Island commissary store with Mr. Phillips during one of these trips?

A. Yes.

Q. And there did the purchasing officer state that he would take on the full Hunt's line?

A. My impression on calling on that base was the purchasing and contracting officer was a little bit difficult to agree outright to any specific time when he would buy a certain number of items, although he did say that he was considering the Hunt line.

Q. Did you ask Mr. Phillips to take over the commissary at San Luis Obispo which he hadn't covered during the first part of his work?

A. I believe so.

Q. Did you turn over to him an order that the salesman had sold to San Luis Obispo to have Phillips fill it?

A. I don't recall that.

Q. Did the commissary stores pay for the goods

(Testimony of Edward Steiger.)

they purchased from Hunt's as much as 60 days after delivery? [385]

A. I would have no knowledge of their actual paying habits.

Q. Were you present at any conversation between Mr. Phillips and Mr. Flynn in the late summer or early fall of 1951 when Mr. Phillips' arrangements with the company were first discussed; I mean in the early stages of the discussion?

A. Yes, I was present; right, I was.

Q. Do you recall any occasion when you were present when Mr. David Mears was also present?

A. Yes, that was in my office.

Q. You recall an occasion in your office?

A. Right.

Q. Was Mr. Flynn in your office, too, at that time?

A. Yes, Mr. Flynn was.

Q. Can you recall about when that discussion took place?

A. No, I can't recall. All I can say is that all the meetings held were held in my office. I was at—I attended each meeting and was there the majority of the time, but I do not recall the actual dates.

Q. Well, would you say that these meetings took place about August or September of '51?

A. It is possible.

Q. At a meeting in which Mr. David Mears was present did Mr. Phillips say that he had surveyed the commissary stores and the commissary business and indicated a wish to sell the Hunt's line to the commissary stores? [386]

(Testimony of Edward Steiger.)

A. Yes, he did.

Q. And did he state in that discussion that he would be unable to make money for a year or two because of the Hunt's prices being established at the bases already?

A. Yes, that is a familiar statement.

Q. And did he say that he wouldn't want to take on the line unless he could have the account for a period of time beyond the first year or two when he wouldn't make any profit?

A. No; to my knowledge that statement was not made.

Q. You mean you know positively that it wasn't made or you do not have any recollection of that being said?

A. I would say I am quite sure that the statement wasn't made based on the fact that he was asking us rather than telling us.

Q. He was asking you rather than telling you?

A. I mean he was asking for the business from us, so I can't—I don't recollect him asking for any specific time.

Q. You do remember him saying that if he took it he wouldn't be able to make any money for a year?

The Court: He has answered that already.

The Witness: I have answered that.

Q. (By Mr. Rothert): Didn't he say that he would have to have the line for more than a year or two in order to have any chance to make money?

A. I don't recall that. [387]

Q. Did Mr. Phillips mention that his present

(Testimony of Edward Steiger.)

business at that time, the bidding business, was profitable; that he was making money at it?

A. I don't remember any "profits" word or words in the statement; he merely stated that he was doing a bidding business.

Q. Did he say that if he took on the Hunt's line he would devote his own attention to it and he would have to give up a lot of his bidding activities?

A. I don't recall that; no.

Q. Did Mr. Phillips say that he personally would handle the sales through the commissaries if you authorized him to sell to the commissaries?

A. No; he had a salesman calling out of town for the commissaries, so——

Q. Did Mr. Flynn in that conversation tell Mr. Phillips to go down and tell Mr. Miller about it?

A. Well, Mr. Flynn suggested that if Mr. Phillips wanted to represent us that he would have to go to the proper authority, perhaps also to the manager of the export or government department in addition to Mr. Miller.

Q. Now, Mr. Flynn didn't say to Mr. Phillips "that you should go to the proper authority or perhaps to the export department"? He didn't say that, did he?

A. Pardon me, I included in there Mr. [388] Miller.

Q. There was a memorandum sent out from Mr. Flynn's office to the commissary stores advising them that Phillips and Company was appointed the

(Testimony of Edward Steiger.)

exclusive jobber to sell Hunt's products to the commissary stores, wasn't there?

A. Yes; there was.

Q. That is Plaintiff's Exhibit 3 (showing paper to witness), and that was issued out of the Hayward office where you and Mr. Flynn had your offices; isn't that true?

A. Yes, sir; this is a rewrite of the suggested bulletin by Mr. Phillips.

Q. With a few minor changes; is that right?

A. To make it applicable to our salesmen as well as to the contracting officers.

Q. Mr. Flynn and you were the ones that decided to send that out, that is, made the decision for Hunt Food Company to send it out, weren't you?

Mr. Cullinan: Just a minute, if your Honor please. That calls for the conclusion of this witness. He can ask who sent it out, but putting the words in the mouth——

Mr. Rothert: That is all right; I will withdraw it.

Q. Do you know whether or not Mr. Miller or any other higher authority in Hunt Food Company did anything to authorize that memorandum to be sent out?

A. To my knowledge it wasn't authorized by anyone superior to Mr. Flynn. [389]

Q. Do you know who it was in the Hunt organization who decided, made the decision that Phillips and Company could act as exclusive jobber to sell

(Testimony of Edward Steiger.)

Hunt's products to the commissary stores in northern California?

A. Well, to my knowledge, Mr. Miller would be the only one I know with authority.

Q. Well now, I don't mean that.

The Court: He just wanted to know if you know who did it.

A. I don't really know, except that Mr. Flynn told me that Mr. Miller, after thinking it over after probably some consultations had agreed that we could use the Wellington Phillips Company as a government jobber. The "exclusive" portion came in that Mr. Miller suggested to the commissaries——

Q. Up until the time that Mr. Phillips sent over a suggested letter there had been no discussion about Mr. Phillips being an exclusive jobber to sell to the commissary stores?

Mr. Cullinan: He didn't state that.

Mr. Rothert: I am asking him if that is what he means. May we have his last answer read?

(Previous answer read.)

Q. My question is, wasn't the exclusive nature of them proposed arrangement with Mr. Phillips discussed with you and Mr. Flynn?

A. Yes. [390]

Q. Now, this authority that you say came from Mr. Miller, didn't that include the exclusive nature of the arrangement, exclusive jobber?

A. Not to my knowledge. My impression is that we were entitled to have a government jobber, and

(Testimony of Edward Steiger.)

Mr. Phillips was under the strong impression that in order to keep out——

The Court: This is not responsive to what you are asking.

Mr. Rothert: No; it is not.

Q. Do you recall any statement made by Mr. Miller or any communication that he wrote in written form related to Mr. Phillips' arrangement with Hunt's between the 1st of September—the 1st of January '52 and the 1st of January '53?

A. Only through Mr. Flynn.

Q. Only what Mr. Flynn told you?

A. Yes.

Q. Coming back to a previous question, in this meeting where the termination was mentioned, you say that Mr. Miller made a statement to Mr. Phillips about the 1st of May, 1953. In that reference to the Schwarz Company did Mr. Miller state that Schwarz Company was going to represent Hunt Foods on all of their sales to the military throughout the country and not confined just to northern California?

A. I don't remember exactly what Mr. Miller would have said [391] about any other district than this.

Q. It isn't what he would have said; it is what you remember of what he said if anything.

A. I beg pardon?

Q. I didn't ask you what he would have said, but what you remember that he did say.

A. Well, I think Mr. Miller said that Francois

(Testimony of Edward Steiger.)

Schwarz would represent Hunt Foods nationally. I believe that is what was said.

Q. And when he said that they thought they would improve or get more business in selling to the military through Schwarz Company, he said they would get more business nationally on the sales to the military through the Schwarz Company, didn't he? A. I don't recall that.

Q. Did your department send reports of the volume of business that Mr. Phillips did down to Fullerton? A. No; we didn't.

Q. You didn't make any reports to Mr. Miller, for instance, as to what amount of business Phillips was doing?

A. Mr. Flynn may have made those reports.

Q. You don't know whether he did or not?

A. No, sir; I don't.

Mr. Rothert: I have no further questions.

The Court: We will take a brief recess at this time. [392]

(Recess.)

Cross-Examination

By Mr. Cullinan:

Q. Did Mr. Phillips at any meeting where you were present state any conditions that he would require if he were to take on the jobbing assignment?

A. No.

Q. During the time that Mr. Phillips was acting for Hunt Foods, did you have any occasion to call at

(Testimony of Edward Steiger.)

his office? A. Yes.

Q. How many times did you call at Mr. Phillips' office? A. In person? You mean in person?

Q. That is about the only way you can call.

A. Oh, I would say at least four or five times.

Q. When was the first time?

A. The first time was about, oh, five months after we were under way with this operation.

Q. And when was the last time?

A. I don't recall the date; but I am sure the last time was just prior to the time of the assignment of the accounts receivable.

Q. What was said at that first meeting? You went to Mr. Phillips' office. Was Mr. Phillips there?

A. Yes.

Q. And what was said at that meeting, do you recall?

A. The reason for my going was to have a talk with Mr. [393] Phillips to convey to him the credit department's insistence that he pay past due invoices and bring the account in order.

Q. When was the next meeting after this? Five months after you started, that would have been somewhere, say, in May, 1952, somewhere around in there, roughly. When was the next meeting?

A. Oh, the next meeting might have been perhaps one or two months later, on much the same subject.

Q. And when was the next meeting after that?

A. I believe in the third meeting Mr. Phillips wasn't there.

(Testimony of Edward Steiger.)

Q. So you didn't get to talk to him?

A. No; I talked to a person in his office.

Q. And when was the next visit to his office after that?

A. I believe the next meeting was just before the assignment of the account where much pressure was being brought on me by the credit department to be sure and convey again——

The Court: Of course that is not responsive to the question. All you were asked was when the next meeting was, and you say it was at the time the assignment of the accounts receivable was made.

A. Just before.

The Court: Just before?

Q. (By Mr. Cullinan): What was said at that time? Mr. Phillips was present at that time?

A. Mr. Phillips was present at that time and we again talked [394] about credit.

Q. What did you say about it?

A. What did I say?

Q. What did you say and what did he say?

A. He promised to send us a check; he had been busy, out of town, and so on and so forth.

Q. And what did you say?

A. I conveyed the dire necessity that payment must be made and that I would have to report to the credit department the results of the meeting.

Q. Was there any discussion at that meeting about deliveries of merchandise?

A. At that meeting I don't recall there was; no.

(Testimony of Edward Steiger.)

Q. At any of these meetings that you had with Mr. Phillips in his office, was there any discussion about delivery of merchandise?

A. At one meeting there was a discussion of an error in our delivery to Travis Air Force Base.

Q. I meant with respect to future deliveries of merchandise. Was there any discussion at any of these meetings there with Mr. Phillips about future deliveries of merchandise?

A. Only that our credit department felt that they had gone just about as far as they could approving orders for delivery to the commissaries; in other words, to either pay up, or that was it. [395]

Q. What was that?

A. That he either pay up, bring the account to date, or the credit department couldn't approve any more orders.

Q. Now, coming down to the termination meeting, where Mr. Miller was present, I think you testified on your direct that at that meeting Mr. Phillips was apprised that he would no longer be selling to the commissaries for Hunt's. Now, at that meeting did Mr. Phillips make any reference to a contract of any kind with Hunt's? A. No.

Q. He didn't discuss or mention any contract at that time?

Mr. Rothert: I will object to that on the ground it is asked and answered and leading and suggestive.

The Court: He has answered the question.

Mr. Cullinan: That is all.

The Court: Is that all?

(Testimony of Edward Steiger.)

Mr. Rothert: No; I have a few questions, your Honor.

Redirect Examination

By Mr. Rothert:

Q. These discussions you had with Mr. Phillips in his office about credit apparently all took place before these accounts receivable were turned over by Mr. Phillips? A. Yes.

Q. And after the accounts receivable were assigned over by Mr. Phillips you didn't call on him about that subject after [396] that, did you?

A. Only by telephone.

Q. But these four meetings that you had where you talked to Mr. Phillips in his office were all before the accounts receivable were assigned?

A. Yes.

Q. Was there any particular reason why you went over to see him about it rather than call him by phone? A. It was of such urgency.

Q. I see. After that accounts receivable assignment the matter wasn't urgent enough to require you to go over and see him in his office; is that a fair statement?

A. That is a difficult question to answer.

Q. All right; in any event you didn't go over to talk to him; whatever talking you did you talked by phone?

A. I wasn't instructed to go over to see him.

The Court: That still isn't an answer to the question. Are the conversations you had with him

(Testimony of Edward Steiger.)

after that time, if any, by telephone and not in person; is that right?

A. Yes, your Honor.

Q. (By Mr. Rothert): The accounts receivable assignment was in about late May, 1952, so therefore would it be correct to say that these visits when you went over to his office were between the time when he started on the 1st of December, '51, and some time in May of '52? [397] A. Yes.

Q. Now, by the time you wrote the letter of April 16, 1953, his account with your company was improved over what it was at the time of the assignment, was it not?

Mr. Cullinan: Well, if your Honor please, there is no showing that this particular witness knows the amounts owed at any particular time. All he said is that he was in arrears.

The Court: Well, I think the document really speaks for itself, doesn't it?

Mr. Rothert: It probably does, your Honor.

Q. When the credit department contacted you and asked you to go over and see Mr. Phillips, didn't they give you a statement of the amounts that Phillips owed and how long they had been owed?

A. At times they would have; other times, no.

Q. Well, would it be fair to say that this fourth meeting in Mr. Phillips' office was the last time that you told him that if he didn't pay or straighten out his account that maybe he couldn't buy any more Hunt's products?

A. That is the last meeting; yes.

(Testimony of Edward Steiger.)

Q. And that is the last time you said that to him, whether it was in person or over the telephone or any other way?

A. No; it wasn't the last time.

Q. When was the last time you told him that if he didn't make some additional payments he wouldn't be able to buy any [398] more Hunt's products?

A. When—it would have been over the telephone, and it would have been subsequent to May; and what date I don't recall.

Q. Well, would it have been in 1952?

A. Yes; it would have been in 1952.

Q. Would it have been in the summer or fall? Can you give us any estimate of when it was, how soon after May?

A. Some time in the summer.

Q. Of '52?

A. Of '52.

Q. Then it would be fair to say that all through the fall of 1952 and up to April, the end of April of 1953, you at no time told Mr. Phillips that if he didn't make additional payments or faster payments on his account, he might not be able to buy Hunt products?

A. I think after the summer of '52 I didn't handle the credit and I wouldn't have—I wouldn't have made that statement.

Q. You mean was there some change in the company's operations that took out of your hands some credit matters that formerly had been in them?

A. Well, the seriousness of the accounts—the assignment of the accounts receivable necessitated

(Testimony of Edward Steiger.)

our office manager making trips to Wellington Phillips' office. [399]

Q. Who was that? A. Mr. Jack Lentz.

Q. And during the period that he made trips to Mr. Phillips' office you also called Mr. Phillips on the phone about it? A. On one occasion.

Q. At about the early part of 1953, before you wrote the letter of April 16th which comments on his account at that time, had you talked to Mr. Phillips about it? A. I'm sure I must have.

Q. Now, you were asked about the statement, about the word "exclusive." Is this what you told Mr. Phillips: that that meant that no other salesman or other representative selling Hunt's products could sell to those commissaries?

A. At that time; yes.

Q. Yes. Now, you knew at the time of these discussions in '51 that Mr. Phillips was experienced in the canned food business, didn't you?

A. Yes.

Q. You knew that he was experienced on sales to the government—military sales to the government? A. He told me so.

Mr. Rothert: I have no further questions.

Q. (By The Court): Mr. Steiger, let me ask you this: These meetings that you attended at which Phillips and Flynn were present when the proposed arrangement, whatever it was, between [400] Phillips and Hunt was discussed, was there any mention of any time for which the arrangement was to continue by anyone?

(Testimony of Edward Steiger.)

A. No, your Honor; no mention of any time.

Q. So that so far as you know it was an arrangement that had no time mentioned?

A. That is right, your Honor.

Q. As far as you heard, I mean.

A. Well, I was there most of the time.

Mr. Cullinan: One question. When did Mr. Flynn die? A. December, 1953.

Mr. Cullinan: That is all.

Q. (By Mr. Rothert): One question. Didn't your duties require you to be out of the office calling on the trade or in business quite a bit of the time?

A. They would normally necessitate that, but Mr. Flynn wasn't too well and I operated as sort of an acting district manager as well as assistant district manager, so that I would run the office, keep the operation fluid and occasionally go out for a few minutes, maybe an hour or two, and come back in.

Q. In 1951, and from August on, how much of the time were you away from the office?

Mr. Cullinan: What was that question?

(Question read.)

Mr. Cullinan: What do you mean by the time—the time in hours of the day? [401]

Mr. Rothert: Just tell us in his own words, the percentage.

Mr. Cullinan: If your Honor please, that question isn't clear to me as to what he is asking for.

(Testimony of Edward Steiger.)

Q. (By Mr. Rothert): What portion of the time of normal business hours from the 1st of August to the end of the year, 1951, would you say you were away from the office and not in it?

A. During that year I would have been away from the office only 20 per cent of the time.

Q. Did you have accounts in the Sacramento Valley that you called on?

A. Yes. No; the company had accounts in Sacramento on whom I would call.

Q. (By The Court): Were you away from the office in your duties as district sales manager visiting various places about 20 per cent of the time?

A. Yes.

The Court: Doesn't that answer the question?

Mr. Rothert: I have no further questions. [402]

The Court: But first you want to examine him?

Mr. Cullinan: Yes, your Honor.

Recross-Examination

By Mr. Cullinan:

Q. Mr. Steiger, starting with the meetings that Mr. Flynn and Mr. Phillips had, were you at all of the meetings that Mr. Flynn and Mr. Phillips had in September of 1951? A. Yes.

Mr. Rothert: I am going to object on the ground it calls for his conclusion. He wouldn't—how would he know there were meetings at times he wasn't there? The witness says he was there on a lot of

(Testimony of Edward Steiger.)

them, a number, but whether he was at all of them or not would be his conclusion.

The Court: Well, that's correct, technically correct. A man can't testify that he was at all meetings without knowing what other meetings there were.

Q. (By Mr. Cullinan): You attended meetings with Mr. Flynn where Mr. Flynn and Mr. Phillips were present? A. Yes.

Q. And those meetings were held at your office?

A. In my office.

Q. Or Mr. Flynn's office? A. In my office.

Q. The meetings were held in your office. Now, were you present when Mr. Phillips was discussing this, the idea of a [403] jobber arrangement with Hunt's? A. Yes.

Q. How many meetings were you present when that was being discussed?

A. Probably two or three.

Q. Two or three. On direct examination you were asked if at any of those meetings Mr. Phillips mentioned that it would take a year or two, or for a year or two he would have to sell at a small profit or virtually cost. At any of these meetings was there any discussion by Mr. Phillips relative to whether for a year or so in handling this jobber arrangement with Hunt's Foods, the jobber would be selling at virtually cost or at a small profit?

A. There was some discussion on that subject; yes.

(Testimony of Edward Steiger.)

Q. Was that at more than one meeting or just the one meeting?

A. I think each time that Mr. Phillips met with Mr. Flynn and myself he brought up that subject.

Q. Was Mr. Mears present at any meeting when you were present? A. Yes.

Q. At any meeting that you were present was there any discussion of the duration of a jobbing arrangement?

A. Any—you mean specific time?

Q. Yes. [404]

A. Not to my—no; there wasn't.

Q. What was that? A. No.

Q. Now, I hand you a letter dated November 26, 1951, which is to Mr. Phillips—from Mr. Phillips to you, which is the original of a copy that is in evidence with an attachment to it, enclosed with the letter, and ask—it is addressed to you—ask if you received that attachment.

Mr. Rothert: The attachment is in evidence, too; isn't it?

Mr. Cullinan: Yes; the attachment is in evidence, too.

A. Yes.

Q. (By Mr. Cullinan): Now, on this original of the attachment there are some pencilled marks. Are those your pencilled marks?

A. That's my writing.

Q. And it was from this that the bulletin, which is Exhibit 3, was prepared? A. Yes.

Mr. Cullinan: We would like to introduce this

(Testimony of Edward Steiger.)

in evidence because it shows what Mr. Steiger added to what Mr. Phillips prepared.

The Court: All right. Is there any point to it?

Mr. Cullinan: Well, the bulletin——

The Court: It has already been testified that the form [405] of the bulletin was submitted by Mr. Phillips and some corrections were made, and the form it went out was introduced in evidence.

Mr. Cullinan: All right.

The Court: I think that's clear in the record unless you want to show something else by it.

Mr. Rothert: The comparison of the two will show the changes, I assume.

The Court: If you feel it has some point to that, put it in, counsel. If you wish to put that in, I have no objection.

Mr. Cullinan: I suggest we might substitute the original for the copy that is now marked in evidence. That would save having the letter twice in there.

The Court: Well, I think counsel submitted that one.

Mr. Rothert: I did; yes.

The Court: As the form that went out. There was some testimony with respect to it. That was the form that went out.

Mr. Rothert: And with a copy of that I submitted also Plaintiff's Exhibit 2.

Mr. Cullinan: Plaintiff's Exhibit 2 is the copy of this, which is the original.

The Court: Oh, I see. All right; mark this. Mark this. [406]

(Testimony of Edward Steiger.)

Mr. Cullinan: Substitute one for the other.

The Court: Better mark it in evidence as a separate exhibit number, so the record will be clear.

The Clerk: Defendant's Exhibit AM introduced and filed into evidence.

(Whereupon, document referred to was marked Defendant's Exhibit AM in evidence.)

Q. (By Mr. Cullinan): Did you have any discussion, Mr. Steiger, with Mr. Phillips with respect to the use of the word "exclusive" in this exhibit, Plaintiff's Exhibit 2? A. Yes.

Q. What was the discussion with Mr. Phillips with respect to the use of that word "exclusive"?

A. My instructions primarily were that Mr. Phillips—

Q. No; the discussion between you.

A. I beg your pardon?

Q. What was the discussion between you and Phillips?

A. With regard to the word "exclusive"?

Q. Yes.

A. That the word "exclusive" would mean that no other salesman, ours or other representatives carrying our merchandise, would be able to sell the purchasing and contracting officers of the commissary stores when the word "exclusive" was used.

Q. At any meeting where you were present with Mr. Flynn and [407] Mr. Phillips, was there anything said by Mr. Phillips about withdrawing any capital from his business if he had this account?

(Testimony of Edward Steiger.)

A. No.

Q. When Mr. Phillips mentioned a year or two of selling at a profit or small profit, was anything said by you and Mr. Flynn about that to him?

A. The main topic of our conversation with respect to that was that Mr. Phillips would have to do a good job.

Q. Well, what do you mean by that? What was said when that subject was mentioned? What was said by you or Mr. Flynn?

Mr. Rothert: I think it has been asked and answered.

The Court: Well, anything additional said besides what you have already stated on that particular subject. I think that is what counsel asked.

The Witness: Could you ask that again, please?

Mr. Cullinan: Would you read the question?

(Record read.)

A. Only that we understood with any business at first it might not be profitable until a person gained experience. That's all I recall.

Q. Do you know if that is the usual experience that jobbers——

Mr. Rothert: We will object to that; calls for the opinion and conclusion of the witness. [408]

The Court: Yes; sustained.

Mr. Cullinan: Asked if he knew.

Mr. Rothert: Can't cure a conclusion by asking a person if he knows it.

(Testimony of Edward Steiger.)

The Court: I will sustain the objection to the form of the question. [408-A]

Mr. Cullinan: One further question. Was Mr. Flynn out of the office at any time you were talking with Mr. Phillips and Mr. Miller?

A. No; Mr. Flynn and I both attended all meetings.

Q. But was he there continuously while you were there? A. Continuously.

Mr. Cullinan: No further questions.

Mr. Rothert: No questions.

The Court: That is all.

Mr. Rothert: I would like to call Mr. Miller for a few questions.

LEE MILLER

called as an adverse witness for the plaintiff; sworn.

The Clerk: Please state your name to the Court.

A. Lee Miller.

Direct Examination

By Mr. Rothert:

Q. In the fall of 1951 you were the division sales manager for Hunt Foods?

A. District divisional sales manager; yes.

Q. District divisional sales manager. And you were the man directly above Mr. Flynn in authority over Mr. Flynn as the head of those district sales?

A. That is correct.

(Testimony of Lee Miller.)

Q. Do you recall when I took your deposition in August of this year in Los Angeles? [409]

A. Yes.

Q. Now, is it true that the only conversations that you can recall with Mr. Phillips in 1951 was when Mr. Reid introduced him to you and you after that had coffee together?

A. That is correct; in 1951.

Q. On one occasion.

A. On the one occasion.

Q. And is it true that you don't recall any details of any discussions about Mr. Phillips' arrangements with the company at that time other than that Mr. Reid told you that he thought Mr. Phillips could do a good job on sales to the commissary stores?

A. Well, that isn't exactly correct. Mr. Phillips at that time stated what he wanted. He stated that he wanted to be an exclusive jobber for us in the Bay Area to the commissaries.

Q. I see. Do you recall what you said in reply to that?

A. Well, I said that was a matter that I was to take up with Mr. Flynn since it was in his area. I also said that if it was all right with Mr. Flynn it would be all right with me.

Q. Any sales that Mr. Phillips would make would be made under Mr. Flynn's supervision, wouldn't they?

A. That is correct.

Q. I will ask you if you gave these answers to these [410] questions in your deposition—

The Court: Well, you can't do that very well,

(Testimony of Lee Miller.)

counsel, unless you want to impeach him in some way.

Mr. Rothert: That is the reason for which I wish to use this portion of it.

The Court: What are you going to do? Are you going to ask him a question about it?

Mr. Cullinan: What page?

Mr. Rothert: Will you read page 6, line 23, to page 8, line 13? Wait. I may want to go a little further than that.

The Court: Mr. Rothert, is it that you want to get into evidence a statement that the witness made in the deposition?

Mr. Rothert: That is right, your Honor.

The Court: Then why don't you ask him the same questions now? Then you might have a basis if he answers differently to impeach him on that ground. That is the proper way to use the deposition.

Mr. Rothert: All right; this will have to be a lengthy question.

The Court: I see what you are trying to get at, but you can't just ask him if he gave those answers to the questions unless you have laid some foundation for it.

Mr. Rothert: I have already laid a foundation for it.

The Court: You will have to ask him some questions to do that. [411]

Q. (By Mr. Rothert): Isn't it true that the only conversation you know you had with Mr. Phillips in

(Testimony of Lee Miller.)

1951 was when Mr. Reid introduced Mr. Phillips to you; that thereafter you walked out of the office and had a cup of coffee and that the only recollection that you have was just over a cup of coffee that Mr. Reid thought Mr. Phillips could do you some good with commissary sales in the Bay Area; that there were no details gone into in your presence to your recollection, and that you recall nothing that Mr. Phillips said in that connection?

A. Mr. Rothert, I have had an hour or two to study that deposition. I certainly did not send Mr. Phillips up to see anybody without going over what he had in mind.

The Court: Just a moment now. You don't want to get into any argument with the lawyer.

The Witness: The thing is I remember more than that.

The Court: Just a moment. All he wants to know is, is that correct what he just stated? Is that what happened? That is what he wants to know.

A. No; I just testified what happened, your Honor.

Q. It isn't a question of what you just testified. He wants to know whether what he has just stated is——

A. Is what I said?

Q. Is correct.

A. That is not—that testimony I gave, but it isn't correct. [412]

Q. He isn't asking you whether you gave that

(Testimony of Lee Miller.)

testimony. He is just asking you as a fact whether that is true or not.

A. That is not fully correct; more happened than was there.

Q. What?

A. More happened than was there at the time I said that.

Q. He is not asking you that. He is just asking you if that is a correct statement.

A. That is a correct——

Q. If you say that it isn't—I will just give you a little education in what the lawyers do to you. If you say that that isn't correct, then he will read to you the answers that you gave in the deposition and say, "Didn't you give that answer in the deposition?"

A. I gave that answer in the deposition.

Q. Is it true or not?

A. It is not wholly true.

Q. (By Mr. Rothert): I think you said that you had had an opportunity to study this deposition.

A. That's right.

Q. Since I asked you the questions?

A. Right.

Q. Before you gave the answers in this deposition you had conferred with Mr. Duniway, had you not?

A. No.

Mr. Cullinan: Well, just a minute. I might [413] explain, you mean just immediately preceding this, or do you mean in preparation for it?

Mr. Rothert: I said before.

(Testimony of Lee Miller.)

Q. At any time before August 23, 1955, at about 10:00 o'clock a.m. when I met you in the offices in Los Angeles, had you conferred with Mr. Ben Duniway, one of the attorneys for Hunt Food Company, about this subject? A. No. [414]

Q. Had anyone asked you questions before that time about what connections you had with Mr. Phillips in 1951?

A. I don't remember. I was told I was going down to give a deposition. I went down; you asked me the questions; I answered the questions. I answered the questions to the best of my ability.

Q. And before you answered my questions you had not answered any questions put to you by Mr. Ben Duniway or anybody else about your relationships with Mr. Phillips in 1951; is that a true statement? A. Not to my knowledge.

Q. Is it your present recollection that you had more than one talk with Mr. Phillips in the fall of 1951?

A. No, it is not. To the best of my knowledge, it was one time I talked to Mr. Phillips.

Q. In the conversation you had with Mr. Phillips, where did that one take place?

A. That took place, I believe, on our way over from my office to a corner coffee shop with Mr. Reid, Mr. Phillips and myself.

Q. In other words, you met Mr. Phillips and you immediately went over to have a cup of coffee together? A. That's right.

Q. Then the discussion was while you were walk-

(Testimony of Lee Miller.)

ing over to the coffee place and over a cup of coffee? [415] A. That is correct.

Q. That is the only conversation you now recall having with Mr. Phillips in 1951?

A. That is correct.

Q. And in that conversation as you now recall it, Mr. Phillips said he would like to act as exclusive jobber on sales to the commissaries in Northern California? A. Correct.

Q. Did he tell you he had talked to Mr. Flynn about it? A. He did not.

Q. Did you tell him he should talk to Mr. Flynn about it?

A. Only that he should discuss it with Mr. Flynn, that is correct.

Q. Did you tell him whatever Mr. Flynn arranged with him it would be all right?

A. If it was all right with Mr. Flynn it was all right with me, that is correct.

The Court: That's what the business men call passing the buck, isn't it? The fellow says it is all right with him if it is all right with the other fellow.

Mr. Rothert: Of course, attorneys do that when they are trying to settle cases, too.

The Court: Is there anything else you want?

Mr. Rothert: Yes, there is, your Honor.

Q. During the time that Mr. Phillips was selling to the [416] commissaries, you didn't get reports from Mr. Flynn or the Hayward office about his sales, did you? A. No, I did not.

(Testimony of Lee Miller.)

Q. You didn't report anything about Mr. Phillips' sales to Mr. Erlanger or people in higher authority, did you? A. No, I did not report it.

Q. The arrangement that Mr. Phillips had as an exclusive jobber selling to the commissary stores in Northern California was the only arrangement that you knew of that your company had in the United States where a jobber—where your salesmen were told not to call on commissary stores because the jobber was calling on them?

A. That is correct.

Q. In your deposition you said you had seen a bulletin that Mr. Flynn had sent out. Is that this, which is Plaintiff's Exhibit 3?

A. May I take a look at that? Yes, that is correct. That is the one that I was somewhat in doubt about that I had seen.

Q. Now, is it true that you did not discuss with Mr. Flynn any details about what arrangements Mr. Flynn was making with Mr. Phillips?

A. That is correct.

Q. And you didn't report to anybody in higher authority, including Mr. Erlanger, anything about details or arrangements [417] that had been made with Mr. Phillips? A. That is correct.

Q. In the early part of 1953 did Mr. Hans Erlanger tell you that he had made arrangements with Francois Schwarz Company to sell military bases on a worldwide basis, and for that reason they were not going to—Mr. Phillips was not going to be able to sell to the commissaries in Northern California?

(Testimony of Lee Miller.)

A. I don't know whether he said he made it or going to make it.

Q. Now, did you attend a meeting in 1953 when you told Mr. Phillips about the termination?

A. That's correct.

Q. Was that about the end of April, 1953?

A. About the 23rd or 24th of April of 1953.

Q. Now, you told him that he was not going to be able to sell to the commissaries any longer?

A. I didn't make that statement.

Q. I mean in substance and effect.

A. No, the statement that I made was that we no longer would have him as our exclusive representative, that we were planning on appointing Francois Schwarz Company on a worldwide basis.

Q. You didn't tell him that he was terminated as a jobber, did you? [418]

A. No, I told him he was terminated as our exclusive representative to sell commissaries. I never told him he couldn't buy and sell Hunt merchandise.

Q. Yes. In that meeting you didn't tell him that a delinquency in his accounts was any reason for his being unable to sell to the commissaries, did you? A. No, I did not.

Q. The subject of Mr. Phillips owing money to the Hunt Foods was not mentioned in that meeting, was it?

A. If you could call a statement I made mentioning—it refers to what Mr. Phillips said to me after I told him he was terminated. At that time

(Testimony of Lee Miller.)

I said, "Well, why don't you pay up?" I mean, you have to get that point—you want me to answer the question as I see it?

Mr. Cullinan: He asked for the conversation; what was said.

The Witness: I see.

Q. (By Mr. Rothert): Now, I asked you, isn't it true that in that meeting there was nothing said about Phillips owing money to Hunt's?

The Court: You already asked him the question, counsel. He answered it.

Mr. Cullinan: He hasn't answered that conversation, your Honor.

The Witness: I did not go into the credit situation of [419] Mr. Phillips at the time of the termination other than to say to Mr. Phillips, when I told him he was terminated and he got all excited about it; he said, "I am going down and tell these fellows this, that," and I said, "Wellington, why don't you just pay up and see what happens? If this organization doesn't do all right, why, you may get a chance to get back with Hunt." That's the only thing I said about it.

Q. (By Mr. Rothert): In the summer of 1952 were you in contact with Mr. Phillips about the possibility of Mr. Phillips' organization selling Hunt's products overseas to military bases overseas?

A. Not to my knowledge. The summer of 1952?

Q. Yes.

A. Not to my knowledge, no.

(Testimony of Lee Miller.)

The Court: Well, counsel, if you are not going to finish your examination——

Mr. Rothert: I am almost through with this witness.

The Court: What?

Mr. Rothert: I have just one or two questions of this witness.

The Court: Well, the other counsel—you have other witnesses?

Mr. Rothert: I am sure that he does.

The Court: You have another witness or will you be through? [420]

Mr. Rothert: I will be through except I might have two or three questions of Mr. Phillips on rebuttal.

The Court: You said you have one or more?

Mr. Cullinan: Yes, your Honor. I will have one witness that will take a little time.

The Court: Well, then, I see no point in pushing you gentlemen today. I know I have had a long day, had a great many things this morning you gentlemen didn't participate in. I think perhaps we better take a recess until tomorrow at 10:00.

Mr. Cullinan: All right.

Mr. Rothert: All right.

(Thereupon, an adjournment was taken to tomorrow, Friday, December 2, 1955, at 10:00 o'clock a.m.) [421]

December 2, 1955—10:00 A.M.

The Clerk: Phillips v. Hunt Foods, further trial.

Mr. Cullinan: Ready.

Mr. Rothert: Ready.

The Court: Proceed, gentlemen.

Mr. Rothert: I think Mr. Miller was on the stand.

LEE MILLER

called on behalf of the plaintiff; previously sworn.

The Court: Have you concluded the direct?

Mr. Rothert: I have just one question that might lead to another one.

Q. Mr. Miller, in the summer of 1952, weren't you in contact with Mr. Phillips about a proposition that he be authorized to sell Hunt's products to overseas commissaries and PX's?

A. I have no recollection of that at all.

Q. I show you a copy of a letter of July 28, 1952, addressed to Hunt Foods, Inc., attention Mr. Miller, sales manager, in the name of Wellington Phillips Company, L. W. Phillips, as the signature, and ask you if you remember receiving that letter.

A. I have no recollection of receiving this letter at all.

Q. So the letter doesn't therefore refresh your recollection that you were in contact with Mr. Miller about overseas—— [423]

A. Mr. Phillips, no.

Q. ——and PX bases.

A. No.

(Testimony of Lee Miller.)

Q. At this time in July of 1952 Mr. Reid had left Hunt Foods, hadn't he?

A. Mr. Reid had left around the early part of July in '52; that is correct.

Q. At that time did your duties, then, encompass any of the overseas bases?

A. I was export manager when Mr. Reid left. I was export manager, that is correct.

Mr. Rothert: Could I have this letter marked for identification, your Honor, the letter of July 28, 1953, addressed to Hunt Foods, attention Mr. Miller?

(Whereupon, letter of July 28, 1953, was marked Plaintiff's Exhibit No. 10 for identification.)

Mr. Rothert: I have no further questions.

Cross-Examination

By Mr. Cullinan:

Q. Mr. Miller, on your direct yesterday you were asked if you had talked with Mr. Duniway at any time prior to the taking of your deposition. I think you answered no. Did you talk with Mr. Duniway prior to the taking of your deposition?

A. Yes. [424]

Q. So that answer was incorrect. Now, will you explain to the Court how you happened to give an incorrect answer?

A. Well, my interpretation of the question Mr. Rothert asked me was had I had a conversation con-

(Testimony of Lee Miller.)

cerning my relationship with Mr. Phillips. I answered no. Mr. Duniway did go over the correspondence that we had in our file before I came down for the deposition and I had—he had had me review the correspondence, that is true.

Q. You had reviewed the correspondence and talked with Mr. Duniway about that correspondence?

A. That is correct, but not the specific point.

Q. That was just prior to the moment or the time of taking of the deposition?

A. That is correct.

Q. You hadn't talked with Mr. Duniway prior to that date? A. I beg your pardon?

Q. You had not talked with Mr. Duniway prior to that date of the taking of the deposition?

A. I don't know whether it was prior or not. I talked with Mr. Duniway just long enough to go over the paper work that we had in the file. That could have been that morning.

Q. Prior to that morning—

A. No, no, not prior to that.

Q. Prior to that morning you hadn't talked with Mr. Duniway about the case? [425] A. No.

Q. What you had done in preparation for that deposition was to read through the file of correspondence?

A. That is correct. That is correct.

Q. In the conversation with Mr. Phillips that you had testified to, was there any discussion of any period of time that Mr. Phillips might want to rep-

(Testimony of Lee Miller.)

resent Hunt Foods? A. No.

Q. I think you testified that your suggestion was that he go up and see Mr. Flynn; is that correct?

Mr. Rothert: I am going to object upon the ground that it is leading and suggestive.

Mr. Cullinan: I am asking him if that is his testimony.

A. That is correct.

Mr. Rothert: Same objection.

The Court: All you are doing is asking him to repeat something.

Mr. Cullinan: Plaintiff's Exhibit 4—I think it is 4, the copy of a letter of March 15th——

The Court: It it is 6.

Q. (By Mr. Cullinan): I show you Plaintiff's Exhibit 6, a copy of a letter purporting to be from Mr. Phillips to you dated March 15, 1953, and I will ask you if you ever received that letter.

A. I have never seen this before. I saw, I would say, a [426] copy of this two or three weeks ago or something purporting to be a copy of this, but I never received this letter.

Q. When did you first see what purports to be a copy of this letter?

The Court: He just said two or three weeks ago.

A. Two or three weeks ago when it was brought in—a copy brought in to my office.

Q. (By Mr. Cullinan): I hand you Defendant's Exhibit H, which is a letter from Mr. Phillip's to you dated April 15, 1953.

A. I have seen this one.

(Testimony of Lee Miller.)

Q. You received that letter? A. Yes, sir.

Q. Did you reply to that letter?

A. I went up, replied personally to the letter, rather than answering the letter.

Q. You went up—"up" being to where?

A. Up to Hayward, and the termination came following that letter.

Q. You went up to meet Mr. Phillips at Hayward? A. That is correct.

Q. And you did meet, then, with Mr. Phillips at Hayward and Mr. Steiger was present?

A. That is right.

Q. And that was the time of the termination that you [427] testified about?

A. That is correct.

Q. Now, when you told Mr. Phillips that you were no longer selling to him as a jobber to commissaries——

Mr. Rothert: I am going to object to that on the ground that he didn't testify to that. He said he told Mr. Phillips he couldn't sell to the commissaries, but he didn't tell Mr. Phillips that he could no longer buy products as a jobber.

Q. (By Mr. Cullinan): When you told him that he could no longer sell to the commissaries, did Mr. Phillips make any reference to the letter, a copy of which was shown to you, Plaintiff's Exhibit 6, dated March 15, 1953?

A. He made no reference to any such letter.

Q. He at no time during that meeting at Hayward made any reference to this letter?

(Testimony of Lee Miller.)

A. No, he did not.

Q. Have you ever received any communication, orally or in writing, from Mr. Phillips, regarding this Exhibit 6, the letter—copy of letter dated March 15, 1953? A. I have not.

Q. Was that meeting the last meeting that you had with Mr. Phillips?

A. That is correct. I left the company two months later.

Q. You left the company two months later? [428]

A. I didn't talk with Mr. Phillips during those two months nor did I receive correspondence from him. [429]

Q. There was no communication, orally or in writing, between you and Mr. Phillips subsequent to this meeting in Hayward?

Mr. Rothert: I think that is a leading question.

The Court: He has answered it already.

Mr. Rothert: It is repetitious.

Mr. Cullinan: That is all.

Mr. Rothert: I have two or three questions, your Honor.

Redirect Examination

By Mr. Rothert:

Q. Mr. Miller, when you reviewed the correspondence with Mr. Duniway just prior to the deposition in August of this year, you saw no letters or copies of letters either from Mr. Phillips to you or from you to Mr. Phillips; isn't that true?

(Testimony of Lee Miller.)

A. No, that is not true. I saw the letter dated April 16th, and I saw the announcement that Mr. Flynn sent out to the commissaries. At the time of the deposition I was a bit confused about that, whether it went—but I saw those two. That's all I recall seeing are those two.

Q. Had you gone through your company files prior to the time of the deposition to refresh your recollection as to the Phillips matter before I questioned you in the deposition? A. Yes, I had.

Q. And up to the time of the deposition, isn't it true that [429] you didn't find anything in the company's files about the Phillips matter?

A. No, it is not true. I found the letter of the 16th.

Mr. Cullinan: That question is indefinite. Anything about the Phillips matter would include invoices or any number of things. I think the question can't be answered unless it is more particularized.

Mr. Rothert: All right.

Q. Isn't it true that at the time of the deposition you could not recall finding any copies of any letters that you wrote to Mr. Phillips or any letters you received from Mr. Phillips? A. No.

Q. I will ask you if you didn't give these answers to these questions in the deposition—I am referring to page 27, lines 2 to 23:

“Q. Have you gone through any of your company files to refresh your recollection as to the events during this period?

“A. Well, it seems to me that—I don't know.

(Testimony of Lee Miller.)

whether it was six months ago or a year ago or some time I went through them to try to refresh my memory on this. It seems to me this isn't the first time this has come up, I mean, where I seem to be in it somewhere, and some time ago, whenever that was I [430] don't remember—I looked around to see what I could find and I just didn't find anything that would come to me now that I found something. Let's put it that way.

“Q. You mean you don't recall finding any copies of letters you wrote him or any letters you received from Mr. Phillips?”

“A. No, not that I could say that I found; I mean, I wouldn't know what it was.

“Q. Do you recall whether there was any separate file kept for Mr. Phillips' account that you examined?”

“A. No, not to my knowledge, because I was looking through all kinds of files, as I remember, trying to find something and I couldn't find anything.”

You gave those answers on your deposition, didn't you, Mr. Miller?

A. That is correct; I gave those answers.

Q. You testified this morning that on this very same morning that I asked you these questions you had reviewed correspondence with Mr. Duniway?

A. That is correct.

Q. Is it your testimony that in that correspondence you reviewed with Mr. Duniway there was a

(Testimony of Lee Miller.)

copy of a letter of April 16th—15th, from Mr. Phillips to you?

A. After going over that and taking due consideration, [431] there was one other that I remember that was in that group, and that was a letter that I also wrote to Mr. Groom confirming what I had done in the termination of Mr. Phillips.

Q. The question didn't ask you about any correspondence with anyone other than Mr. Phillips.

A. I see.

Q. But is it your testimony this morning——

A. It is my testimony that——

Q. ——that on that very same morning you had seen and read the letter of April 15, 1953, from Mr. Phillips to you?

A. I had apparently read that letter. Despite what I apparently said there, I have seen that letter.

Q. When you say you had apparently read that letter——

A. I have read that letter.

Q. Had you read it that very same morning, on August 23, 1955?

A. I had seen it, yes.

Q. Then you completely forgot it in answering this question?

A. That is correct. I must have forgotten it, because I had seen it.

Q. Where is the letter that you saw? I will withdraw that. Is this Defendant's Exhibit H——

The Court: It is the same as Plaintiff's Exhibit 6.

Q. (By Mr. Rothert): Is Defendant's Exhibit

(Testimony of Lee Miller.)

H the one [432] that you saw, and I call your attention to the handwritten note on the bottom of the second page—that you saw on that very morning of your deposition?

A. Well, it was either this letter or a copy of this letter. I can't tell whether it was his handwriting on the bottom. It is also marked by the fact that it said 1853 instead of 1953. That is another reason, and I remember at the time I called that to our attention.

Q. You didn't remember that at the time I asked you the questions in the deposition?

A. That is correct; I didn't.

Mr. Rothert: Mr. Cullinan, may I ask you, does this purport to be the letter that Mr. Miller received or that Mr. Steiger received?

Mr. Cullinan: I don't know, Mr. Rothert. You and I sat down with a lot of correspondence from both parties and sorted it out and had copies photostated of those that we did not have, and I don't know whether——

Mr. Rothert: And I furnished you with a copy of this at the time and I wrote you a letter confirming the fact, and you have since obtained this letter; is that true—this particular copy from Mr. Steiger?

Mr. Cullinan: No, that letter we have. I am pretty sure we had that letter.

Mr. Rothert: Well, I will let the letter speak for [433] itself.

Q. At the time you talked to Mr. Duniway on

(Testimony of Lee Miller.)

the matter of August 23, 1955, did you remember having received this letter of April 15th, Defendant's Exhibit H, prior to that day?

A. Yes, the letter of April 15th I received.

Q. As I understand it, you don't recall whether the one that you saw with Mr. Duniway had this note——

A. Yes.

Q. ——Ed Steiger. Dear Ed, For your information (written in pencil).

A. No, I don't. I don't know whether I saw a copy of that or that one.

Q. When you say a copy of that, do you mean a copy of this one with the note to Ed Steiger on it or a copy without the note to Ed Steiger?

A. The portion to Ed Steiger, I don't remember that last, whether that was on the letter I saw.

Q. Can you produce a copy of that letter that you received without the note to Ed Steiger on it?

A. That I can't tell you. All the records were turned over a long time ago in the case. I don't know.

Q. Did you see any copy of a letter dated July 28, 1952, when you reviewed the correspondence?

A. No, I did not.

Q. When you went up to Hayward and had the meeting with [434] Mr. Phillips in which the termination took place, what did you do to arrange to have Mr. Phillips come to the meeting?

A. I asked Mr. Steiger to call Mr. Phillips and tell him I would like to talke with him.

Q. In that meeting Mr. Phillips didn't refer to

(Testimony of Lee Miller.)

his letter of April 15th, either, did he, Defendant's Exhibit H?

A. Mr. Phillips made no reference to any letter.

Mr. Cullinan: That is 1953 in that last question.

Mr. Rothert: I amend it to 1953.

I have no further questions.

Recross-Examination

By Mr. Cullinan:

Q. Mr. Miller, you have gone through the files of the company since the deposition; at least you have gone through the correspondence file and the files of the company since your deposition, have you not? A. That is correct.

Q. Have you at any time found the letter or a copy of the letter of March 15, 1953?

A. No, sir.

Mr. Cullinan: That is all.

Further Redirect Examination

By Mr. Rothert:

Q. Were those files that you went through since the deposition the same ones you went through before the deposition?

A. That is correct. They are up in the loft. [435]

Q. At the time of your deposition you had not reviewed any files from the Hayward office, had you? A. No, I had not.

Q. The files that you reviewed when you were

(Testimony of Lee Miller.)

with Mr. Duniway, did he have them with him when you met or did you have them with you?

A. He had them with him.

Q. Did he identify those files as to where they had come from? A. No.

Q. Did he say these were company files he had?

A. He just asked me to look them over; he didn't say where they came from.

Mr. Rothert: I have no further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

Mr. Rothert: That is all of the plaintiff's case, your Honor, except for a very small matter in rebuttal.

The Court: The plaintiff rests, then?

Mr. Rothert: Yes, your Honor.

Mr. Cullinan: At this time, if your Honor, we, on behalf of the defendant, would move for a non-suit against the plaintiff in this action on the following grounds: First——

The Court: It is a motion for dismissal of the complaint? [436]

Mr. Cullinan: Yes.

The Court: In the Federal Court it is not a non-suit.

Mr. Cullinan: There is no proof in this case that Mr. Flynn or Mr. Miller or whoever made the alleged contract claimed by plaintiff had any authority in writing to enter into a contract which was to last more than one year, and under the rule set forth in California Civil Code Section 2309,

such an authority in writing is necessary and must be proved by the plaintiff.

In the case of *Elkwood v. Moore*, decided by the Ninth Circuit, 97 Fed. 2d 402, at 408, a case somewhat similar to this in that a manager of the company had entered into a contract which the statute of frauds would have required to be in writing, the court held that there was no proof by the plaintiff in this case that the manager had written authority from the officers of the company to enter into such a contract.

In the case of *Anderson v. Standard Lumber Company*, 64 Cal. App. 410—

The Court: How could the defendant raise that point here? They acted, conducted relationships for a considerable period of time.

Mr. Cullinan: But not a relationship under a contract which would be for a period of ten years, five years or any other period. The only relationship they had was they were [437] selling goods to the plaintiff.

The Court: You don't mean to say, do you, that when two business men enter into a contract that they don't put in writing, on one side an officer of the corporation can say he has no authority for the company, but for two years or some substantial period of time, the parties act under the contract—they act under some contract; that thereafter because the man didn't have authority in writing to enter into it, that the man on the other side, assuming a breach, would not have any right of action?

Mr. Cullinan: Yes, your Honor, because the plaintiff here never dealt with an officer of Hunt Foods.

The officers of Hunt Foods, we may assume, knew that we were selling to the plaintiff, as we were selling to the plaintiff for resale; but as in the *Anderson v. Standard Lumber* case just cited, the Court points out that the corporation officers had no knowledge of the alleged terms of the contract even though they did know that the plaintiff had been employed. In other words, they say that knowing that they are employed, or, in this case, knowing that we are selling to the plaintiff, does not suggest any knowledge of the alleged terms, the terms alleged by the plaintiff in this case. And in that case they held that there was a failure of proof because the plaintiff had not established that officers of the company not only knew that he had been employed but knew the [438] alleged terms. According to the record, there is no knowledge by any officer of Hunt Foods that the plaintiff was operating under the contract that he alleged, which would be a contract beyond the period required under the statute of frauds to be acknowledged in writing.

The Court: Well, assuming that the evidence does not show that the contract was entered into for a period of a number of years as alleged—assuming it does not show that, there is evidence, however, that there was a contract entered into which no time was specified, according to the testimony——

Mr. Cullinan: Yes.

The Court: Now, would you say that if the parties acted under a contract of that nature, because that isn't in writing, then in the event of an alleged breach there could be no recourse and recovery would be debarred because there was no written authority from an officer of the corporation?

Mr. Cullinan: Yes, your Honor; if the contract was going to last for more than a year, the authority of the man who made the contract for Hunt's had to be in writing. Now, they may have had a contract to buy and sell, which they did. If that contract had lasted for a year, that still doesn't prevent the defendant from requiring the [439] plaintiff to show that if he wants to claim that that contract was to last for more than a year—for instance, in *Seymour v. Oldrich*, the principals there ratified and affirmed the oral contract of employment, but did so in ignorance of any alleged ten-year duration provision, their understanding being it was a contract from month to month. And they held that since there was no written authority to enter into the contract, the plaintiff was claiming, the plaintiff was therefore barred from recovery.

The Court: I don't see that that *Seymour v. Oldrich* applies, except on the basis of the general principle for which the case is so often quoted, that it has any particular relationship to the facts of this case. We are now looking at it only from the point of view of the motion to dismiss from the plaintiff's evidence.

Mr. Cullinan: Yes, your Honor.

The Court: Taking the evidence even most favorable to the defendant, it would appear at this point that there was an arrangement made for which no time was specified but which continued apparently for over a year.

Mr. Cullinan: Yes. So they had an arrangement for a period December, '51, to April, '53. That is all the evidence shows at this point. They had an arrangement that lasted that long. But there is no authority.

The Court: Suppose the plaintiff overpaid [440] the defendant during the second year of the operation and he had some money coming from the defendant; he wouldn't have a cause of action——

Mr. Cullinan: He would have a common count.

The Court: ——he wouldn't have a cause of action because the terms of the contract were not approved or authorized, or the man who made the deal was not authorized in writing to make it by an officer of the corporation?

Mr. Cullinan: Well, he would have a common count claim against the company.

The Court: Well, he would have a cause of action.

Mr. Cullinan: Yes, but not on a contract.

The Court: Well, have you some evidence to present in the case? You said something about having one witness.

Mr. Cullinan: Yes, I have some witnesses. I had further grounds on the motion for dismissal. Maybe I just could state them——

The Court: This case has been dragging, gentle-

men, and there has been a lot of repetition. I don't want to be critical again, but I have listened very patiently to many, many repetitious examinations, and I want to get through with it.

Any legal point that you want to make, you can make at the conclusion of the evidence. Let's get whatever evidence you have, and you may make your motion at the end of the [441] case with the same force and effect as if you made it now, and if there isn't a legal ground for recovery, it would be just as good when all the evidence is in as it is now. I would like you to get this case concluded, so far as the evidence is concerned, and then I will be very glad to hear whatever legal points you have to make in support of any motion you wish to make.

Mr. Cullinan: It is your Honor's desire, then, that I not even state the additional grounds?

The Court: I am not wanting to cut you off. All I am indicating is that whatever motion you want to make, the Court will reserve the right for you to make it on any grounds that you want to make it.

Mr. Cullinan: All right, your Honor. Thank you.

Mr. Rothert: I will reserve any answer to his argument that he has made up to this time until a later time, your Honor.

Mr. Cullinan: Mr. Church.

JOHN L. CHURCH

called as a witness on behalf of the defendant;
sworn.

The Clerk: Will you please state your name to the Court?

The Witness: John L. Church.

Direct Examination

By Mr. Cullinan:

Q. Mr. Church, would you state your [442] position with Hunt Foods?

A. I am the general credit manager.

Q. Were you the general credit manager since the year 1951? A. That is correct.

Q. And are you familiar with the record of accounts of sales to and payments by Wellington Phillips Company? A. I am.

Q. Those records are under your control?

A. Yes.

Q. When did you first meet Mr. Phillips?

A. It was in the summer of 1951; I believe it was July.

Q. Did that meeting last very long?

A. No, it was a rather short meeting.

Q. Was there any business discussed at that meeting? A. There was.

Q. What was discussed at that meeting?

A. Well, Mr. Reid introduced me to Mr. Phillips and stated that Mr. Phillips wanted to purchase Hunt products, to be a wholesale distributor to the commissary as well as on his own account, and

(Testimony of John L. Church.)

would I give him a line of credit. I told Mr. Reid and Mr. Phillips I had no credit file on him; that I would build my file up; in the meantime he was to submit a credit application and figures.

Q. And that was what was discussed at that meeting?

A. That was the sum and substance. [443]

Q. When did you next meet with Mr. Phillips?

A. I think approximately three or four weeks later.

Q. Would that be in September of '51?

A. Yes.

Q. So in September, 1951, you met with Mr. Phillips and that was down at Fullerton, was it not?

A. Both meetings were at Fullerton.

Q. Will you tell us what was said at that meeting?

A. Well, I think at that time Mr. Phillips had submitted his first order; I had started my credit file——

The Court: You were just asked to state the conversation.

A. At that time he had not yet submitted the figures that he send them to me. It was a very brief meeting. [444]

Q. (By Mr. Cullinan): Now, did you discuss—did you have a discussion about terms of payment at that meeting?

A. Yes, there was. Mr. Phillips explained that in dealing with the commissaries he would probably need a line of credit bigger than his capital

(Testimony of John L. Church.)

would justify, and would I go along. I said our terms were two per cent ten days, and that's all the terms I could give him; he had to pay within those terms.

Q. What did Mr. Phillips say?

A. Nothing particular I can remember other than he acquiesced to them.

Q. Other than what?

A. Other than to agree to them.

Q. What were your terms again to him?

A. Two per cent ten days.

Mr. Rothert: Objected to as asked and answered.

Q. (By Mr. Cullinan): Was there any discussion as to any extended time of payment at that meeting?

A. Well, in connection with the request for terms, Mr. Phillips stated he was doing business with firms in the San Francisco area, Kingan was mentioned as one of them—where he sold, for their account, and he paid them when he got paid. I told him I couldn't accept any such arrangement.

Q. Was there any discussion about a line of credit to him at that meeting? [445]

A. Only generally. Mr. Phillips was asking for a line of credit commensurate with the business he could do, and I told him that I could not agree to that until I had sufficient figures to justify such credit.

Q. Did you discuss with him any limit of credit at that time? A. No, I did not.

(Testimony of John L. Church.)

Q. Let me hand you——

Mr. Rothert: May I see it, please? (Passing papers.)

Q. (By Mr. Cullinan): I hand you a six-page document entitled, "Accounts Receivable," in the name of Wellington Phillips, and ask you what that document is?

A. These are the original ledger cards of Wellington Phillips Company as taken from our accounts receivable files.

Q. It covers the whole period that Wellington Phillips was handling the Hunt products?

A. Yes. It covers any dealings which we have had with Wellington Phillips.

Mr. Cullinan: We would like to introduce this in evidence as our next in order, and ask the right to substitute a photostatic copy of the original. No objection?

Mr. Rothert: I assume they were prepared under his supervision and direction.

Mr. Cullinan: Yes. [446]

Q. These were prepared under your supervision and direction and under your control, are they not, these accounts receivable?

A. These accounts receivable were and the photostat was.

Mr. Cullinan: We will offer the photostat in evidence as our next exhibit.

The Clerk: Defendant's Exhibit AN, introduced and filed into evidence.

(Testimony of John L. Church.)

(Whereupon Account Receivable referred to was received in evidence and marked Defendant's Exhibit AN.)

Q. (By Mr. Cullinan): Calling your attention to Exhibit AN, the upper righthand corner, is the date 9/51. Was this opened up at the time of the meeting with Mr. Phillips?

A. No, this was opened up at the time of the first entry which is dated, I think, September——

Q. 28?

A. 28, and is reference to our credit file which was opened up September 1.

Q. Now, the word "limit \$5,000" in the upper righthand corner, when was that figure inserted?

A. That figure was inserted some time in November when this first sale to the commissary went into effect.

Q. Was there any discussion——

A. November, 1951. [447]

Q. Was there any discussion between you and Mr. Phillips with respect to that figure of 5,000?

A. Well, I have no definite recollection of a \$5,000 figure. My recollection of my discussion with Mr. Phillips were along a general line, that I would have——

The Court: That's not an answer to the question.

Q. (By Mr. Cullinan): Was there any discussion about a \$5,000 figure?

A. I have no recollection, with Mr. Phillips.

(Testimony of John L. Church.)

Q. Now, have you prepared from this accounts receivable a summary of the totals of the debts and the credits for the calendar years covered by this accounts receivable? A. I have.

Q. I hand you a document and ask you if that is a summary of the debits and credits on this account taken from the accounts receivable, Exhibit AN, for the calendar years involved in the accounts receivable? A. It is.

Mr. Cullinan: I would like to introduce this in evidence as our next exhibit, as a summary.

The Clerk: Defendant's Exhibit AO introduced and filed into evidence.

(Whereupon summary referred to was received in evidence and marked Defendant's Exhibit AO.)

Q. (By Mr. Cullinan): Now, Mr. Church, this exhibit just [448] introduced has the debits and the credits for the years '51, '52, '53, and '54, '54 being only on the credit side. Then there is a summary at the bottom entitled "Actual Debits and Actual Credits." Now, calling your attention to the debit side in the year 1951, \$22,114.74, that includes, does it not, the computation includes two prebills dated October 16, 1951? A. That is correct.

Q. One in the sum of \$9,490 and one in the sum of \$3,112.50. A. Yes, sir.

Q. Now, what were those prebills?

The Court: What are we going to take up mat-

(Testimony of John L. Church.)

ters of this kind for? Obviously there were some items that were either duplications or some——

The Witness: They were payable——

The Court: ——and they don't represent the actual debit or credit amounts. I don't want to go into all this, gentlemen; it has no bearing on the case of any material nature.

Mr. Cullinan: I wanted to establish how we arrived at the actual debits and credits.

The Court: Apparently there is no dispute as to the amounts. Nobody has made any contention this is not a correct statement of the account.

Q. (By Mr. Cullinan): Mr. Church, I hand you a yellow, a [449] series of yellow pages entitled, "Wellington Phillips Company," and ask you if that is a summary prepared from the records under your control of invoices by date, by number, the amount, and the date that those invoices were paid. A. That is correct.

Q. And that was prepared under your direction?

A. That was prepared under my direction and at my request.

Q. And that is a correct summary?

A. It is a correct summary.

Q. Now, calling your attention——

Mr. Rothert: Just a moment. Let me see it.

The Court: Can't we shorten this matter, gentlemen? This case is now getting to a point where I just don't see any point to it. What interest is it to the Court to have summaries of the information?

Mr. Cullinan: The purpose of this document,

(Testimony of John L. Church.)

which I proposed, about to propose as an exhibit, it shows when invoices were paid, what dates, and it shows at the start he paid right ten days after being invoiced, and then in January of 1953 he started to pay much later than ten days, until we get down towards the termination where he is three and four months behind in his payments. Now, the accounts receivable have—you can't translate the invoice billing and the payments—you can't relate them without a summary that shows that an invoice dated December of 1952 was paid [450] on April of 1953. This summary selects the invoices by date of billing and the payment, shows what date each invoice was paid, and through that we are able to show, then, they started out on a ten-day basis, started to make it fifteen and twenty——

The Court: I don't think there is any dispute about the fact that was the story of the account.

Mr. Rothert: We will agree that is the general trend. I don't think we can agree with the exact accuracy, but I don't think the differences are important.

Mr. Cullinan: The intent of the plaintiff in starting his payments right ten days after billing, and then later gradually—and this shows how the material started to expand, until we get to—at the time of termination and just before, until he was three and four months behind.

The Court: Well, there is no question about that. The evidence already shows that. Of course, coincidentally his business was increasing.

(Testimony of John L. Church.)

Mr. Cullinan: May we introduce this?

The Court: All right.

Mr. Cullinan: Offer this in evidence as our summary.

Mr. Rothert: Are they records from which they were taken here?

Mr. Cullinan: Yes, that's this (indicating).

Mr. Rothert: I mean, that's a summary of a previous [451] exhibit?

Mr. Cullinan: Yes, it ties the dates of——

The Court: Ties the dates of payment and billing in with the invoice record. That's what you're putting in, isn't it, counsel?

Mr. Cullinan: Yes, your Honor.

The Court: All right. Exhibit AP, is it?

The Clerk: Yes, sir. Defendant's Exhibit AP introduced and filed into evidence.

(Whereupon, summary referred to was received in evidence and marked Defendant's Exhibit AP.)

Q. (By Mr. Cullinan): Did you ever have any conversation with Mr. Phillips subsequent to the one, the last conversation that you testified to?

Mr. Rothert: In September, '51?

Mr. Cullinan: September, '51.

Q. Did you ever have any conversation with Mr. Phillips about changing terms of payment?

A. It is possible in that period that I did have some discussions with him. He may have come into the office and made some——

(Testimony of John L. Church.)

The Court: You will have to answer the question, did you or didn't you.

The Witness: To the best of my recollection, I did not, your Honor. [452]

Mr. Cullinan: Your Honor, I know that you want to shorten this up and there are a lot of letters in evidence written by Mr. Church to Mr. Phillips and back and forth, talking about the status of his account. I had proposed to go into some of those letters; I think your Honor feels the letters speak for themselves.

The Court: I am inclined to think so. I read them as they came in and I think I have a pretty good idea of the relationship between the parties. I don't see there is any particular dispute with reference to the status of the account. It is as it was.

I think you can take it that whatever finding the Court would have to make in that regard would be in accordance with the actual record facts as shown in the record and in the letters. If you have some particular thing that you feel you want to present, don't hesitate to do so. Again, I don't want to foreclose you, but I don't see any particular significance in this controversy to that fact. I don't see any necessity for any evidentiary matter being presented concerning it, because it does appear from the record that as time went on the plaintiff, his credit-debit balance was built up and got bigger, although it remained, according to the record here, fairly static over a period of time as to the amounts.

(Testimony of John L. Church.)

I notice it stayed around between 18 and 22 or 23 thousand dollars except for one period [453] when it went up to \$27,000. That went on over a period of time and that the payments of the actual invoices were made sometimes several months after the invoices were rendered, and that that was the condition of the account at the time of the so-called termination.

Now, I don't know what you can add to it by any further testimony in that regard. That's what it is.

Q. (By Mr. Cullinan): Mr. Church, did you at any time ever tell Mr. Phillips that he could pay when able? A. I never did.

The Court: I didn't hear that.

Q. (By Mr. Cullinan): Did you at any time tell Mr. Phillips that he could pay Hunt Foods for merchandise sold to him when able?

A. Never did.

Q. Now, it is admitted that certain trade acceptances were issued and without further, if counsel has no objection—we would like to introduce the originals of the trade acceptances.

Mr. Rothert: No objection.

The Court: All right.

The Clerk: Defendant's Exhibit AQ introduced and filed into evidence.

(Whereupon, trade acceptances were received in evidence and marked Defendant's Exhibit AQ.) [454]

The Court: Three, aren't there?

(Testimony of John L. Church.)

Mr. Cullinan: There are three.

The Clerk: Three, sir.

Q. (By Mr. Cullinan): Now, Mr. Church, prior—just prior to the signing of these trade acceptances did you have a conversation with Mr. Phillips about the execution of the trade acceptances?

A. I did.

Q. Well, how long prior to the signing of this trade acceptance did you have a conversation with Mr. Phillips about a plan to sign the trade acceptances?

A. Well, immediately after the time I received notice of the termination of this arrangement, I started collection procedure.

Q. Let me clarify that. The trade acceptances are dated July 8, 1953? A. That's right.

Q. Was there any discussion just prior to July 8, 1953, when these were signed, with Mr. Phillips?

A. There was.

Q. How long before that?

A. I believe the earliest date I talked to Mr. Phillips was about in May, 1953, about the payment of his account, how he wanted to pay it.

Mr. Cullinan: Could we have a short recess at this time? [455]

(Recess.)

Q. (By Mr. Cullinan): Mr. Church, did you ever have a conversation with Mr. Phillips in which he referred to a contract with Hunt Foods?

A. I did.

(Testimony of John L. Church.)

Q. When was that conversation?

A. That, I believe, was in the first part of 1954, probably February or March. He had come down to my office to discuss further payments on the trade acceptances.

Q. The trade acceptances were then——

A. They had been signed and he had been paying on account.

Q. Yes. What was said by Mr. Phillips and by you at this time?

A. Mr. Phillips was present, Mr. Conrad, my assistant, and myself. Wellington said that he wanted to get out accounts paid up and that when he had gotten it paid up he intended to file a suit for damages against Hunt. I said, "What are you talking about?" "Well," he said, "I have a contract with Hunt and that has been breached and I have a damage action against you. I don't want to let that stand in the way of my payments; I want to get cleaned up first."

My answer to that was, "I don't believe you have any contract. I have lived with this deal from start to finish, and I know of no such arrangement. But if you have such a contract, you send me a copy of it, tell me what you got in [456] mind and I will take it up with my people. By the way, you are not referring to that letter which Glenn sent out announcing your appointment as a jobber?" He said, "No, I am not referring to that letter. I have a letter of agreement appointing me as exclusive distributor with no cancelation privilege."

(Testimony of John L. Church.)

I said, "If you have such a letter, submit it. If you don't, I don't want to hear any more about any negotiation or payment of this matter."

Q. Did you have any prior conversation with Mr. Phillips in which the subject of a contract was mentioned?

A. At no time in my prior discussion with Mr. Phillips was the subject of contract mentioned.

Q. You had many discussions with him between December, 1951, and April of 1953? A. I did.

Q. You had many discussions between April of 1953 and March of 1954? A. Quite a few.

Q. Your discussions, apart from the letters which are in evidence, did you have any telephone conversations with Mr. Phillips relative to this status of his account between April of '53 and this March of '54 date? A. I did.

Q. And in any of those conversations was the subject of a [457] contract at all discussed? This is between April, '53, and March of '54.

A. Not after his attorney wrote that letter making a demand on us.

Q. The conversations, the telephone conversations between April of '53, and March of '54, were relevant to the status of his account?

A. Status of his account, that is correct.

Q. It has been testified that initially you had this 1950 partnership return, initially when you were arranging with Mr. Phillips and were making arrangements already discussed about in September, '51, you had his 1950 income tax return?

(Testimony of John L. Church.)

A. Yes, he gave us that.

Q. After that date did you ask for further financial statements?

A. At regular intervals we were asking him for late financial figures.

Q. And when did you get the next financial statement from Mr. Phillips?

A. Well, the 1951 figures——

Q. To refresh your recollection, so we will get it exact, I show you a document, partnership income return, 1951, Wellington Phillips, with a receipt stamped, received May 15, 1952.

A. That is the date we received it in my department. [458]

Q. And between September of '51 and May of '52 you had not received any other financial statements from Mr. Phillips? A. I did not.

Q. Did you, after May 15, 1952, receive any financial statements from Mr. Phillips?

A. He gave me some figures, I believe, in the first part of '53.

Q. Would that be his '52 income tax return?

A. It was his '52 income tax return.

(Colloquy between counsel inaudible to the reporter.)

Q. (By Mr. Cullinan): I show you the partnership return of income for the year 1952 from Mr. Phillips. Counsel has handed me, pinned together, two documents; one is entitled "Return," and the other is entitled "Amended Return." Showing you

(Testimony of John L. Church.)

the one that is not entitled "Amended Return," I ask you if that is what you received, was a copy of this document.

A. I don't recall whether—what I had was in pencil figures like this.

Q. Look at the total.

A. It showed a net income of \$5,000.

The Court: Do you want to introduce some document in evidence?

Mr. Cullinan: I just want to ask him, without introducing the document, what the total income showed on that [459] partnership return was.

The Court: Well, state what it was.

The Witness: It was \$5,000—

The Court: If there is no objection.

Mr. Rothert: No objection. I think the accountant himself said that an amended return wasn't made until some time—

The Witness: I never received a copy of the amended return—

The Court: Never mind.

Mr. Rothert: So he couldn't have—

The Court: Have you got an amount there, counsel?

Mr. Cullinan: \$5,239.27.

Q. Mr. Church, between that receipt of that income tax return and the receipt in May of 1952 of the '51 income tax return, did you have any financial statements from Mr. Phillips?

A. It seems to me I received a balance sheet,

(Testimony of John L. Church.)

some figures from them; what the date is I don't recall.

Q. You don't recall whether it was between May of '52 and the receipt of this '52 income tax return?

A. No, that was prior to May, '52.

Q. Prior to '52. Now, based upon the information, the financial information with respect to Mr. Phillips, that was in your possession during the time of his purchase and [460] sale of Hunt products, what is the limit of credit that you would allow him?

Mr. Rothert: I will object on the ground it is self-serving, calls for the opinion and conclusion of the witness.

The Court: I will sustain the objection, what he would do. I don't see that that is of any importance. What was done was the only factual matter involved. [461]

Q. (By Mr. Cullinan): Exhibit C, a letter dated April 22, 1952, from Mr. Phillips to you, refers to the formation of a corporation by Mr. Phillips. Prior to that time had you been consulted by Mr. Phillips with respect to any plan to form a corporation?

Mr. Rothert: Objected to as incompetent, irrelevant and immaterial——

The Court: I am inclined to think so. I don't know what that has to do with it.

Mr. Rothert: The partnership did it all the time; they had a corporation, but——

(Testimony of John L. Church.)

The Court: The corporation didn't have any part in this.

Mr. Cullinan: Well, it appears on this, your Honor please——

The Court: Unless you claim that it did, of course, you can bring it out. If it didn't, what is the good of wasting time about it?

Mr. Cullinan: What I wanted to show is this, that under the plaintiff's interpretation of his arrangement he could dissolve his partnership, form a corporation without even talking with Hunt Foods. In other words, he could terminate the arrangement with us any time he felt like it.

The Court: I don't see the materiality of that, what he though he could do. It's something that wasn't done.

Mr. Rothert: We made no such contention, your Honor. [462]

Mr. Cullinan: No further questions.

Cross-Examination

By Mr. Rothert:

Q. Mr. Church, I will show you a Hunt's Food invoice, No. 41430 to Wellington Phillips in the amount of \$140.25.

Mr. Cullinan: What is the number of that invoice?

Mr. Rothert: 41430.

Q. It has a payment stamp—paid stamp on it. Is that a paid stamp used in your office?

(Testimony of John L. Church.)

A. It is not. It is somebody else's paid stamp. We do not stamp invoices and mark them paid and send them back.

Q. That must be Mr. Phillips' paid stamp.

A. Paid stamp, and they paid him.

Q. I see. When the Nut Tree, for instance, paid here——

A. Yes, it is—evidently this invoice was returned by the customer to Mr. Phillips and marked paid for his records, and it does not have any relationship to his payment date and our payment date.

Q. The same thing would be true of these others?

A. Yes, those are similar stamps, you will notice.

Q. Yes. Well, showing you that same invoice, what would be the invoice date on that?

A. You mean the date we transmitted it to Mr. Phillips?

Q. Yes, the date when it became an invoice and started time running for payment? [463]

A. I would say October 21.

Q. 31? A. October 31, 1951.

Q. That is the date you sent them out?

A. Yes, and his ten days would run from that date.

Q. This one says "Net ten days".

A. Yes, there is no cash discount on that invoice.

Q. Nearly all of your invoices to Phillips would show two per cent ten days, wouldn't it?

A. I would assume that would be correct, Mr.

(Testimony of John L. Church.)

Rothert, because he was entitled to a cash discount under this arrangement.

Q. Now, later on——

The Court: I don't quite understand that. I don't know whether it is of any importance in the case or not, but what benefit is it to anybody that buys merchandise if he has to pay it in any event in ten days, why, then, your purchase price—your statement as to a discount is meaningless, isn't it? You might just as well say, instead of billing a man for \$100, you bill him for \$90 payable in ten days.

The Witness: Well, he doesn't have any period after the ten days, your Honor, in which his account is not delinquent. That is the only meaning of it. It is a term generally used only in the canning industry.

The Court: Well, I used to have a little experience in business many years ago, and I am just wondering about it. [464] There is no virtue to that sort of thing, it doesn't have any meaning.

The Witness: The real intention is he has ten days. If he pays it in ten days, all right, but we can go after him on the eleventh day as a delinquent account. He doesn't have 30 days——

The Court: Well, you might as well bill him for \$90 instead of \$100.

The Witness: Well——

The Court: Due and payable in ten days.

The Witness: Well, if he didn't pay it he would still get the lesser amount under the net billing arrangement.

(Testimony of John L. Church.)

Q. (By Mr. Rothert): How long a period of time is there——

The Court: He has to pay it in the ten days to get the discount.

The Witness: That's correct.

The Court: If they don't pay it in ten days, what is the status of the account?

The Witness: It is delinquent.

The Court: You mean you are going to charge him interest?

The Witness: No, we don't charge interest, but we proceed to go after him for collection. But if he had 30 days net, we wouldn't start our collection process until after the expiration of the 30 days, or 60 days, whatever period of time it may be. Some firms sell on a —— [465]

The Court: You say that is something peculiar to the canning industry? It isn't a general procedure in business, is it? I never saw——

The Witness: I have heard of it in other firms, but not on a general basis, your Honor.

The Court: Well, why do you mean to do that?

The Witness: Well, it started with drafts. At one time all your canning business was done on sight draft and they were allowed ten days in which to pay the sight draft and earn their cash discount. Then when they went over to open billing, the same billing terms carried.

The Court: Really the basis upon which it started didn't exist any more. You just followed the old custom.

(Testimony of John L. Church.)

The Witness: Followed the old custom, that is correct.

The Court: I am sorry I interrupted you. Go ahead.

Q. (By Mr. Rothert): For how long a period of time where you bill for two per cent ten days, how long a period of time exists when a buyer may not get the cash discount and is not delinquent in paying the account?

A. I don't understand that question.

Q. Well, at a certain point the cash discount is no longer available and at a certain point it is due and payable and is thereafter delinquent. What's the margin of time between those two points?

A. The 11th day after the date of the invoice the account is [466] delinquent.

Q. And on the 10th day he can get the two per cent discount?

A. If he paid it on the 10th day he would get the cash discount.

Q. Now, as I understand it, you don't recall any discussion with Mr. Phillips that he was to have \$5,000 line of credit?

A. Not that particular, no.

Q. Do you recall any discussion in which any specified amount was stated as a line of credit to Mr. Phillips?

A. Well, when we opened the account——

Q. Well, just say——

A. I do recall a discussion where Mr. Phillips and I generally discussed the amount of credit I

(Testimony of John L. Church.)

would give him. That started back in about August of '51. He said he would need \$5,000 of credit. I told him that based upon the information I had I wouldn't give him that much; I might give him a couple of thousand dollars, that he would have to submit me financial information to justify \$5,000 of credit or any other amount of credit; that in my opinion he didn't have a financial background sufficient to justify this arrangement and that he would have to get the money from some place else, or find some other way of doing business if he ever was going to do the business that he hopefully intended to do.

Q. Now, when you say "this arrangement" what arrangement are you talking about? [467]

A. Taking the account as a jobber to sell our products to commissaries. He talked about, well, "You are doing, say, \$1,000 a month. I hope to get that up to \$5,000 in no time, maybe \$10,000." I say, "When you get \$10,000 a month you are out of business; you are out of business above \$5,000 a month unless you can find some way to pay me on the due date or on a cash basis."

He said, "I can't pay you on a cash basis."

Q. Well, later on, about the time of the assignment of the accounts receivable you did approve an extension of credit to the point where Mr. Phillips could pay you after he got the money from the Government on those commissary sales?

A. After the assignment of the accounts receiv-

(Testimony of John L. Church.)

able he was to pay us the day he got the money from the Government.

Q. And you were informed at that time that in some cases the Government was as late as 60 days in paying, were you not?

A. That isn't the way I was informed.

Mr. Cullinan: Just a moment.

Q. (By Mr. Rothert): Well, did Mr. Phillips make such a statement to you?

A. He didn't make it exactly that way. His statement was: "You know, there is billing errors, short payments and so forth and not always be paid promptly."

I said, I understood those matters and would take such information into account where occasionally he would go beyond [468] a normal period of payment.

Q. Did Mr. Phillips ever discuss with you that some sales had been turned over to him by the Hunt salesman without profit?

A. No, he never did.

Q. You didn't write him any letters about his accounts, did you, after June of 1952? There is a letter of June—I am looking at the wrong date.

The Court: June 30—no, that is '53. You wrote him letters in '53. [469]

Q. (By Mr. Rothert): During the period from June of 1952, to May of 1953, you didn't write Mr. Phillips any letters about his account, did you?

A. I have no recollection of any such letters. If I did, they would be in the file.

(Testimony of John L. Church.)

Q. At any time did Mr. Phillips tell you that the Government sometimes was as slow as 30 or 60 days in paying for the sales to the commissary stores?

A. As I stated before, he said there would be occasions when they would be slow. That is the general rule.

Q. Did you tell him anything to the effect that in those cases he would nevertheless have to pay in 10 days whether he got the money from the Government or not?

A. Up to the assignment of the accounts receivable our terms were 10 days and only 10 days. He never had any provision or arrangement to pay beyond the 10-day period. It was a very specialized controlled account and it was handled as such.

Q. It changed at that point, didn't it?

A. It changed at that point.

Q. Other than the 2 per cent 10 days entries on the invoices and what you told Mr. Phillips about it—I will withdraw that.

Did you have any information during the time that Mr. Phillips was selling these accounts that his volume of business [470] was increasing?

A. No, other than what would show on the ledger account.

Q. The dollar amounts on the ledger card?

A. That's right.

Mr. Rothert: I have no further questions.

(Testimony of John L. Church.)

Redirect Examination

By Mr. Rothert:

Q. Mr. Church, I show you a letter dated June 30, 1953, relating to the account, the assignment of accounts receivable. You sent that letter to Mr. Phillips? A. I did.

Q. In that letter you state——

Mr. Rothert: Your Honor, this letter is after the date of termination.

The Court: It is already in evidence, isn't it? It is Defendant's Exhibit L.

Mr. Cullinan: June 30th of '53?

The Court: Yes, from Church to Phillips.

Mr. Rothert: Yes.

Mr. Cullinan: Yes, from Church to Phillips.

The Court: You have got it marked as Defendant's Exhibit L.

Mr. Cullinan: Yes, your Honor. I thought that was another one.

Q. I call your attention to Defendant's Exhibit L in which it is stated in the first paragraph: [471]

“With reference to your account with us and the discussions which you have had with our Mr. Lentz, to say the least I am very disappointed in our collection results. There is owing to us at the present time \$23,198.90, and to the best of our knowledge only a few thousand dol-

(Testimony of John L. Church.)

lars remains to be collected by you from the Government agencies to whom this merchandise was sold, which means you have collected over \$20,000 of money belong to Hunt Foods, Inc., and have failed to account for it. All sales made to you under assignment of accounts receivable which made you trustee for all monies for our account. You have had no authority to use any of this money for your own uses.”

Now did you at any time prior to the termination have any conversation with Mr. Phillips with regard to the status of the payments under those accounts which had been assigned? That is, prior to April of '53. Did you have any telephone conversations with him?

A. I'm sure I had a few telephone conversations but I can't place the exact dates.

Q. Did you have any telephone conversations prior to—do you know whether any were prior to the termination of Mr. Phillips? [472]

A. No; immediately prior to the termination date my collection contact was through the Hayward office, and Mr. Steiger.

Q. Mr. Steiger? A. Yes.

Q. Anybody else at that office?

A. No; I would send it either to Flynn or Steiger as the case may be. They were both equal in the collection end of it.

Q. Did you have any meetings with Mr. Phil-

(Testimony of John L. Church.)

lips in the latter part of '52 or early '53 regarding the status of his account?

A. None that stands out, no; he may have come into the office.

Q. He may have, but you don't recall?

A. No.

Q. Now, I hand you a letter dated May 8, 1952, from you to Mr. Phillips relating to the accounts receivable and ask you if that is a letter you sent to Mr. Phillips? A. I did.

Q. I call your attention to the middle of the next to the last paragraph:

“I would appreciate it very much if you would continue to pay as many of these Government accounts within our terms as is possible. We will expect payment of those accounts that require a longer time to pay immediately after you receive payment.” [473]

Was there any discussion with Mr. Phillips at this time about the terms of payment on his account to you—to Hunt?

A. There was. He said that he would need longer terms in some instances, but that for the most part he would continue to pay within 10 days.

Q. And what did you say?

A. I said that's the way I wanted it. That letter confirms what we discussed.

Mr. Cullinan: I will offer this letter of May 8, 1952, as our next in order.

(Whereupon, letter of 5/8/52 was received in evidence and marked Defendant's Exhibit AR.)

Mr. Cullinan: That is all.

Mr. Rothert: No questions.

The Court: That is all.

Mr. Cullinan: Call Mr. Steiger.

EDWARD STEIGER

recalled as a witness on behalf of the defendant;
previously sworn.

Direct Examination

By Mr. Cullinan:

Q. Mr. Steiger, what products represent the bulk of Hunt Foods canned business?

A. Tomato sauce, tomato ketchup, peaches, tomato juice, solid pack tomatoes. [474]

Q. Those particular items represent the great proportion of Hunt Food's products?

A. A substantial portion of our volume.

Q. Now, Mr. Steiger, in your capacity as a representative of Hunt's in the Hayward office, have you had occasion at regular intervals to go around to the chain stores to observe prices of Hunt's articles and other articles on the shelves?

A. Yes.

Q. Have you at any time noted the price of, let us say tomato sauce, on the shelf of a chain store?

A. Yes.

Q. Have you had any occasion—let us take S&W

(Testimony of Edward Steiger.)

tomato sauce—to note the price of S&W tomato sauce? A. Yes.

Mr. Cullinan: Strike that.

Q. You have had occasion to note the price on the shelf of a chain of Hunt Foods tomato sauce, have you not? A. Yes.

Q. At that time would you know the cost to the chain of Hunt Foods tomato sauce?

A. At what time, sir?

Q. At the time you saw the item. In other words, let me ask you this preliminarily: You are current at all times on what Hunt's was selling its products for—at what price it was selling its products to the chains, are you not? [475]

A. That is part of my job.

Q. When you observe a price of Hunt's tomato sauce at a chain, can you tell the markup on that tomato sauce when you see the price on the shelf of a chain store? A. Pretty close.

The Court: What are you trying to find out? Whether the witness knows what the stores sell the products of Hunt's for?

Mr. Cullinan: What the markup is.

The Court: What they sell it for would accomplish that. Obviously he should know that. I don't think you need to spend a lot of time laying a foundation. Ask him what you want to know.

Q. What generally is the markup, from your observation, on Hunt's tomato sauce?

A. In chain stores?

Q. In chain stores.

(Testimony of Edward Steiger.)

A. I would say the average is three cans for 21 cents.

Q. I meant the percentage markup.

A. Oh, the percentage markup. Eight to ten per cent regular weekdays; as low as cost or two per cent on weekends.

Q. What about tomato ketchup?

A. Ketchup would be a little bit higher. I would say ketchup would average around 14 to—maybe average 14 per cent weekdays; sometimes cost on weekends or 10 per cent. [476]

Q. And what about, say, tomato juice?

A. Tomato juice being a more competitive item would probably be not higher than $16\frac{2}{3}$ per cent; perhaps an average 10 per cent markup, and at cost or below cost on a weekend if there were a special in that store.

Q. Mr. Steiger, during the time that your salesmen were selling to the commissaries you had occasion to visit the commissaries and go with salesmen at times to the commissaries, did you not?

A. I went to Castle Air Force Base once and a couple of times to Presidio, San Francisco. I didn't make a general practice of it, but I did visit a base or two.

Q. And the officers in charge of the various commissaries changed from time to time, did they not?

A. Yes, yes.

Q. And at times when there is a change in commissary officers is there a change in the line of products that is put into the commissaries?

Mr. Rothert: I will object on the ground that

(Testimony of Edward Steiger.)

it calls for the conclusion and opinion of the witness.

Mr. Cullinan: From his experience.

The Court: That is a pretty general question.

Mr. Rothert: He only went to two of them.

The Court: I would be here for a week going into every item and every different man. I will sustain the objection. [477]

Q. (By Mr. Cullinan): Mr. Steiger, you testified—this, if your Honor please, is just to get the record straight—you testified that after the accounts receivable were assigned you had never gone to Mr. Phillips to discuss the status of his account with him. Subsequent to that testimony we have discussed the accounts receivable and trade acceptances, and I ask you whether that testimony that you never went to Mr. Phillips' office to discuss his accounts after the execution of the assignment of the accounts receivable was correct?

A. No, it was not correct, because I did visit Mr. Wellington Phillips' office after the assignment of the account.

Q. And for what purpose?

A. For collection.

Q. And without going into it at this time so that we won't delay things, how many times you visit him after the assignment of the accounts receivable?

A. At least once.

Q. And on that occasion was the conversation as you have related yesterday on the stand with respect to his account, the status of his account?

A. Similar, yes.

(Testimony of Edward Steiger.)

Q. Do you know, Mr. Steiger, what proportion of Hunt's products are represented by the items that you mentioned? You said they were a substantial part. Do you know the percentage of Hunt volume that is attributable to these items? [478]

A. At least 80 per cent.

Q. At least 80 per cent?

A. At least 80 per cent.

Mr. Cullinan: That is all.

Cross-Examination

By Mr. Rothert:

Q. Is that 80 per cent on nationwide over-all sales or Northern California?

A. I can speak only from our district in Northern California.

Q. On the other items of the Hunt line not mentioned specifically by you, did you find that the percentage of markup in chain stores was usually more than the items specified?

A. Slightly above, yes.

Q. This one time you saw Mr. Phillips after the assignment of the accounts receivable, was that in 1952 within a month or two or three after the assignment?

A. It could have been, say, three months after the assignment.

Q. Did you have anything to do with turning over to Mr. Phillips sales that salesmen had made at San Luis Obispo commissary and Hamilton Air Force Base commissary for him to handle?

(Testimony of Edward Steiger.)

The Court: This is another subject now which wasn't gone into on direct examination, and if it is a subject will you tell me what the materiality is? [479]

Mr. Rothert: The materiality is that they were turning over to Mr. Phillips accounts on which the prices had been fixed with no profit for him to assume the credit of financing those orders at the very same time he was talking to them about "Hurry up and pay your account," or during that general period.

The Court: What do you mean by taking over the orders?

Mr. Rothert: Well, the salesmen got an order from the Government and priced the order. Before it was filled it was turned over to Mr. Phillips and Hunt's billed Mr. Phillips.

The Court: And he filled it and was billed for the amount?

Mr. Rothert: And he filled it and was billed at two per cent 10 days.

The Court: Is that correct or not?

A. That is correct in, at least, one instance.

Q. (By Mr. Rothert): Wasn't it correct in one instance that Hamilton and one instance at San Luis Obispo? A. You are right, sir.

Q. And that was at least not before the latter part of 1952?

Mr. Cullinan: Can we have the date set?

Mr. Rothert: San Luis Obispo in October and Hamilton Air Force Base in December of '52. [480]

The Witness: What is the question, sir?

(Testimony of Edward Steiger.)

The Court: Is that correct or not? Can't we get along?

The Witness: It is correct.

The Court: It is awfully slow.

Mr. Rothert: I have no other questions now.

Redirect Examination

By Mr. Cullinan:

Q. Mr. Steiger, the price in chain stores on the shelves, were they higher than those at commissaries, at nearby commissaries?

A. Considerably.

Q. Higher priced? A. Considerably.

Q. The chain store prices were higher than the commissary?

A. Considerably higher than the commissary.

Mr. Cullinan: That's all.

Recross-Examination

By Mr. Rothert:

Q. You mean considerably more than the percentages that you have testified to which was the difference between the Hunt prices and the prices on a chain store shelf?

The Court: No, no, that isn't what he means. He means the prices that were charged in the chain stores were higher than the prices charged in the commissaries.

Q. (By Mr. Rothert): Considerably more. Was that difference greater than the percentage of

(Testimony of Edward Steiger.)

markup that you observed in [481] the chain stores?

A. Do you mean does the commissary take a greater markup than the chain store?

Q. No. Did you sell to the commissaries and to the chain stores at substantially the same price?

A. Yes.

Q. Now, you say that the chain stores had a markup of certain percentages on certain items, you have already testified to that. Now, how much lower were the commissary prices on the shelf than the chain store prices on the shelf?

Mr. Cullinan: What particular item are you talking about?

Mr. Rothert: These same items that he said there was considerably more difference between the prices.

A. I would say about nine per cent, perhaps.

Q. Nine per cent represents the difference between what?

A. Between the eventual—the markup in the commissary as against the markup in the chain.

Q. Do you mean the price in the commissary or the markup in the commissary?

A. The markup as well as the price.

Q. Well——

The Court: What difference does it make? They were sold at the same price to the commissaries as they were to the chain stores. [482]

Mr. Rothert: Well, it only makes a difference—he said the difference in price at the commissary stores and the chain stores was considerably more.

(Testimony of Edward Steiger.)

Now, if they sold them at the same price to both, how could the difference in price be considerably more than the markup in the chain stores? It couldn't be.

Mr. Cullinan: That isn't what he testified to.

The Court: I don't understand that.

Q. (By Mr. Rothert): You said considerably more; what would you——

The Court: Obviously the commissary stores sold these same commodities cheaper than——

Mr. Rothert: Yes.

The Court: Well, everybody knows that.

Mr. Rothert: I know that.

The Court: What is the point you want to make?

Mr. Rothert: I want to find out what he was talking about when he said that this difference was considerably more.

The Court: I didn't understand the witness to say that.

The Witness: I said considerably more, your Honor.

The Court: You mean the commissaries charge more for the same merchandise than the chain stores?

The Witness: No, sir, the question was——

Mr. Rothert: The difference between the commissary prices and the chain store prices. He said they were considerably [483] more.

The Witness: I said the chain store prices were considerably more.

(Testimony of Edward Steiger.)

Mr. Rothert: Oh, I see.

The Witness: Than the commissary.

The Court: Well, anything else now?

Mr. Rothert: No further questions.

Mr. Cullinan: No further questions.

The Court: That is all.

(Witness excused.)

The Court: Now, you have got still something to present, I take it, to wind up the case on either side?

Mr. Cullinan: Just a moment, your Honor.

The Court: I think we had better put it over anyhow; you may want to make some argument, or something like that, finish up whatever evidence either side has.

Two o'clock. Would that be all right?

Mr. Cullinan: Yes.

(Whereupon, an adjournment was taken until 2:00 p.m., this date.) [484]

Friday, December 2, 1955—2:00 P.M.

The Court: Have you any further witnesses?

Mr. Cullinan: No, your Honor.

When Mr. Cousins was on the stand I sought to bring out that there is in the industry a custom and usage in appointing jobbers under which the arrangement is terminable at the will of each. I did not make a formal offer of proof at that time although the colloquy indicates that that is what I

wanted to do. And if it is satisfactory with the Court to consider that colloquy at the time as a formal offer of proof I would not make one now. Otherwise, I would make a formal offer of proof.

The Court: That is all right with me if it is with counsel.

Mr. Cullinan: Thank you.

Mr. Rothert: It is all right that we consider that as an already made offer of proof?

Mr. Cullinan: Yes.

Mr. Rothert: That is all right with me, yes.

Mr. Cullinan: We have no further witnesses.

Mr. Rothert: I will call Mr. Phillips.

L. W. PHILLIPS

recalled on behalf of the plaintiffs, in rebuttal; previously [485] sworn.

Direct Examination

By Mr. Rothert:

Q. Mr. Phillips, I will show you what purports to be an invoice from Hunt Foods, No. 40068, dated October 18, 1951. Is that an invoice that you received from Hunt Foods on or about that date for purchases from Hunt Foods? A. That is.

Q. In the amount of what? A. \$910.

Q. I hand you a check of Wellington Phillips Company, No. 2224, dated—it looks like 11/2/51.

A. That's right.

Q. And ask you what that is?

A. This check is in payment for this invoice.

(Testimony of L. W. Phillips.)

Q. For invoice 40068? A. Yes, sir.

Q. On the back of it it has the endorsement of Hunt Foods, Inc., dated November 8th, 1951?

A. Yes, sir.

Q. And invoice No. 41430 of Hunt Foods, Inc., in the sum of \$140.25, dated October 31, 1951.

A. Yes, sir.

Q. Check of Wellington Phillips Company, No. 2260, dated November 21, 1951, in the amount of \$140.25. Is that check [486] in payment of invoice No. 41430? A. Yes, sir.

Q. That has endorsements dated November 24, 1951, of Hunt's Food, Inc.

Mr. Rothert: I would like to offer those in evidence, your Honor. The only purpose is to show that the dates of payment were later than the dates shown on this summary schedule introduced this morning by the defendant and to show that in some of the very early payments by Mr. Phillips the payments were made substantially longer than ten days after invoice rendered.

The Court: You mean in that respect you correct the dates specified in the schedule?

Mr. Rothert: Yes.

The Court: As one exhibit?

Mr. Rothert: One exhibit.

(Whereupon, documents referred to above were marked Plaintiff's Exhibit No. 11 in evidence.)

Q. (By Mr. Rothert): I will show you Plain-

(Testimony of L. W. Phillips.)

tiff's Exhibit 10 for identification, copy of a letter dated July 28, 1952, addressed to Hunt Foods, Inc., attention of Mr. Miller, Sales Manager, and ask you what that is?

A. That is a letter written to Hunt's Foods in Los Angeles, attention Mr. Miller, relative to a conversation.

Q. Is it a letter—— [487]

A. Yes, sir.

Q. ——that you had something to do with?

A. I wrote it; my secretary typed it.

Q. Was it mailed on or about that date?

A. Yes, sir.

Mr. Rothert: I would like to offer that as Plaintiff's next in order.

The Court: What is the date?

Mr. Rothert: July 28, 1952. The contents in it are not—it isn't of any importance here; I just wanted to show another letter sent to Mr. Miller of which he has no recollection or copy.

(Whereupon, document formerly marked for identification was received in evidence and marked Plaintiff's Exhibit No. 10.)

Q. (By Mr. Rothert): Mr. Phillips, in any of the discussions you had with a representative of Hunt's Foods about your account, did anybody make a statement to you in substance that if you——

Mr. Cullinan: Just a minute. I suggest that the witness be asked to tell any conversation without

(Testimony of L. W. Phillips.)

being suggested the substance of some conversation. I think the witness' own words as to what the conversation was would be the best way——

The Court: It looks like you are starting out by leading [488] him on something, unless what you are asking him to do is to controvert something that some other witness testified to. You can then refer to a particular matter. I don't know what you have in mind.

Mr. Rothert: Otherwise, I would have to ask him to repeat every conversation he had, and then in the absence of something it would appear that nothing was said.

The Court: It would not be leading, I don't believe, if the question were put in the form: at any time did you ever make such-and-such a statement? Is that what you have in mind?

Mr. Rothert: Yes, it is, your Honor.

The Court: Suppose you reframe the question.

Q. (By Mr. Rothert): In any conversation you had with a representative of Hunt Foods did any representative or didn't any representative ever make a statement to you that if you didn't pay your account faster than you were then paying it, you might not be allowed to purchase any more of Hunt's Foods products?

A. The statement is that I might not be able to purchase any more? That was never made to me.

Q. In any such conversation did a Hunt's representative make a statement that you would not be able to purchase Hunt foods any more if you

(Testimony of L. W. Phillips.)

didn't pay up your account more promptly? [489]

A. No.

Q. In the times that you talked to Mr. Church about your account did you or did you not at any time state to him that you would continue to pay up most of the invoices within the ten day period?

A. That I would continue to pay up most?

Q. Yes. A. No.

Q. Did you ever talk to Mr. Flynn or Mr. Flynn's office in Hayward? A. Yes, sir.

Q. You talked to him in his office about how many times, approximately?

A. In the course of our arrangements?

Q. Well, let's say just in the fall of 1951.

A. Possibly a half dozen.

Q. Now did you got out during the noon recess to examine any prices at the Safeway Store on Market Street here?

A. I did, sir—the largest Safeway Store there is.

Q. You mean there is in San Francisco?

A. There is, period. That is their largest store.

Q. What prices did you look at—the prices for what items?

A. Tomato sauce and 2½ Hunt's solid pack tomatoes—Hunt's tomato sauce 8-ounce.

Q. What was the shelf prices of those two items? [490]

A. The shelf price at the present moment on Hunt's tomato sauce in the Safeway Stores at Duboce and Market is three for 22, 88 cents a dozen, \$5.28 a case. Their cost is \$4.50. The gross on

(Testimony of L. W. Phillips.)

the selling price is 15 per cent, a gross on the cost of 19. On Hunt's solid pack tomatoes——

Q. What was the price on the Hunt's solid pack tomatoes?

A. The Hunt's solid pack tomatoes were 25 cents, \$6.00 a case, 24 cans in a case. Their cost today is \$4.60, a gross on the case of \$1.40, a gross on the selling price of 23½ per cent, a gross on the cost of 29 per cent.

Q. In your analysis of sales to the Alameda Naval Air Station which you testified about the other day, the average number of cases per item sold in a 12-month period, what percentage of the total sales during that 12-months period is represented by tomato juice, peaches, tomatoes and tomato sauce? A. Thirty per cent.

Mr. Cullinan: You are asking for the percentage of sales at the Alameda Air Station that he made in that one year?

Mr. Rothert: Yes, based on the average monthly volume that he testified to previous.

Mr. Cullinan: What I want to find out, are you talking about specific amounts or estimated amounts?

Mr. Rothert: You will remember he took the entire sales for 12 months of each item and divided it by 12 to get the [491] average number of cases of every item per month, and I would submit that since each item is divided by the same number, 12, that the total sales in the year would end up with the same percentage.

(Testimony of L. W. Phillips.)

Q. That is 30 per cent of what?

A. Thirty per cent of—the figure is figured this way——

Q. You say that represents 30 per cent of what?

A. Of the total volume.

Q. Of the total volume——

A. Each month.

The Court: The total volume of what you sold to them?

A. Yes, sir, of the 54 items, yes, sir.

Q. (By Mr. Rothert): Now during the time from, say, the beginning of 1952 until the time of termination, did you have funds in your business available to pay the Hunt's invoices substantially faster than you did? A. No, sir.

Q. There has been testimony about a sale at San Luis Obispo and one at Hamilton Air Force Base that was turned over to you. In those particular sales did you make the sale yourself?

A. No, sir.

Q. Did you have anything to do with the pricing of the items? A. No, sir.

Mr. Cullinan: If your Honor please, I don't think this [492] is proper rebuttal. The witnesses for the defendant have not gone into what was sold at Camp San Luis Obispo or who arranged for the sale.

The Court: But I thought that Mr.——

The Witness: Steiger.

The Court: One of the last witnesses did testify there were two transactions.

(Testimony of L. W. Phillips.)

Mr. Rothert: Yes.

The Court: I think it was Mr. Steiger; two places that were taken over, as it were, from——

Mr. Cullinan: That testimony was put in as part of the plaintiff's case when he called Mr. Steiger.

Mr. Rothert: Well, that happened this morning.

The Court: It is already in and it hasn't been disputed, so what is it you want to establish?

Mr. Rothert: I want to bring out that some of the items on each of those sales Mr. Phillips had to sell to the commissaries at a price less than he had to pay Hunt Food for it so that it made him lose money on certain items in those sales.

The Court: Well, what were the circumstances under which he took over these particular sales? Why was that done? What is the significance of the details of them?

Mr. Rothert: As I understand it, Hunt Foods continued to sell to Hamilton Air Force Base and that Mr. Phillips [493] consented to that, and then Hunt Foods eventually asked him if he would take it over; on that Mr. Steiger testified when they sort of paved the way.

The Court: Yes, I understand that, but I mean what is the importance of going into the detail of it? This is not an accounting proceeding.

Mr. Rothert: It means that at the time—this happened to be in the fall of 1952, one in October and one in December—that the defendant claims Mr. Phillips was getting pretty bad on his credit.

(Testimony of L. W. Phillips.)

They turned over transactions to him that not only make him lose a little money but that he has to finance himself for Hunt's, in effect.

Mr. Cullinan: There is no claim by the defendant that he had to take that over.

Mr. Rothert: So there would be a small contribution to the state of the account.

The Court: How did it come about? Do these transactions amount to much?

Mr. Rothert: Do they amount to much? One is \$2,000 and the other is——

The Court: It hasn't been developed how that came about. Counsel have made some statements about it but I don't know what evidence there is as to the circumstances under which the plaintiff assumed these accounts, if it has materiality.

Q. (By Mr. Rothert): What happened, what were the [494] circumstances when you took over this sale to the Hamilton Air Force Base?

Mr. Cullinan: If you Honor please, I submit that this is not proper rebuttal.

The Court: Well, I agree with you that it is not proper rebuttal. It is not something that you produced. It is not rebuttal to rebut something that counsel himself develops affirmatively on cross-examination.

Mr. Cullinan: There was no contention in the evidence thus far one way or another as to why it was taken over. No evidence was introduced one way or the other as to why it was taken over.

(Testimony of L. W. Phillips.)

The Court: There has been reference to it and I think that—oh, I will ask the questions myself.

The Witness: O.K.

The Court: Counsel won't be responsible for it and then you can take objection to it if you wish.

The Witness: Yes, sir.

The Court: I want to get through with the testimony.

Q. How did you come to take over these two accounts? A. Hunt's asked me to.

Q. Well, Hunt asked you to. Who asked you to?

A. Mr. Steiger.

Q. Why?

A. Because he wanted his salesmen to call on somebody else [495] and us to service the account as we did the rest of the accounts.

Q. Those were the only sales that had then been made by Hunt's own salesmen at that time?

A. Yes, sir.

Q. And if you took that over that cleared the deck, as it were?

A. Except one account, and that was given to me on the last trip there, the Mare Island Naval Shipyard.

Q. That is the other one that is referred to?

A. The third one.

Q. The third one? A. Yes, sir.

Q. And what were the amounts of these three transactions?

Mr. Rothert: Well, I don't know Mare Island.

(Testimony of L. W. Phillips.)

I don't have that segregated out, but three thousand——

The Court: Are they substantial or are they de minimus?

The Witness: \$3,000.

Mr. Rothert: We are not contending that he lost a lot of money on them but that he handled these accounts without making any profits.

The Court: You have made the contention that they were either the same price that he was being charged for them or less in some instances. You said that. Is that the fact?

Mr. Rothert: I said a number of the items were less than [496] what he was being charged for them.

The Court: What does that amount to?

A. Very small.

Mr. Rothert: Very small?

The Witness: Very small, infinitesimal, 10 or 15 cents a case or 5 cents a case.

Mr. Rothert: De minimus.

The Court: It doesn't amount to much?

A. No, sir.

Q. (By Mr. Rothert): When were you asked to take over the Mare Island account?

A. At the time of Mr. Steiger and my call there in the early part of April or around the 1st of March.

The Court: What year?

A. 1953.

Q. (By Mr. Rothert): Did you have any contact with Mr. Miller in the summer of 1952?

(Testimony of L. W. Phillips.)

A. Did I have contact with Mr. Miller in the summer of '52?

Q. Yes. A. Yes, sir.

Q. Did you talk to him? A. Yes, sir.

Q. What was the subject of your discussions—your sales to the commissaries?

A. Yes, sir. [497]

Q. Or something else?

A. Sales to the commissaries.

Q. Sales to which commissaries?

A. Northern California. Did you say the summer of '52? Is your question the summer of '52?

Q. Yes, it was.

A. Well, that was wrong. I thought you meant '51. '52 I talked to him about——

Q. I show you this letter which is Plaintiff's Exhibit 10. At about that time in July, 1952, did you ever talk to Mr. Miller as distinguished from writing him that letter? A. Yes, sir.

Q. About what?

A. About the sales to overseas bases after Mr. Reid had left.

Q. Who initiated the subject of the sales to overseas bases?

The Court: This is a collateral matter, isn't it, counsel? Why bother with it?

Mr. Rothert: I have no further questions, your Honor.

(Testimony of L. W. Phillips.)

Cross-Examination

By Mr. Cullinan:

Q. Mr. Phillips, when you were asked to take over the Hamilton sales, the sales to the Hamilton commissary—— A. Yes.

Q. ——did you object to that?

A. No. [498]

Q. You were glad to get it, weren't you?

A. Sure; it is another account.

Q. Do you know of your own knowledge when Mr. Reid left Hunt's?

A. I do not, sir.

Mr. Cullinan: No further questions.

Mr. Rothert: No questions.

The Court: Now, gentlemen, does that conclude the evidence on both sides? [499]

Mr. Rothert: Your Honor, I have another witness here that is entirely corroborative, and if I may state what it is, it wouldn't be necessary to put him on. Mr. Clark Turner, a food broker, independently of Mr. Phillips, checked the prices of those same prices that he just testified about today during the noon recess and so it would be entirely corroborative of the prices that Mr. Phillips told us about.

The Court: There is no dispute about it. I take it that that's correct.

Mr. Rothert: The plaintiffs rest.

The Court: You want to present this motion now, counsel?

Mr. Cullinan: Be glad to present it now, or in writing, whatever your Honor wishes.

The Court: Well, I would rather have you do it now; since it is practically a factual case, I would like to hear from you, having the facts clearly in mind.

Mr. Cullinan: Your Honor please, under all the evidence in this case there is no contract such as contended for by the plaintiffs. I think it is quite evident from all the evidence in this case that there was no contract for any ten-year term. The plaintiff testifies that he made such an arrangement with a dead man. The witnesses who were present, he says that Mr. Steiger was not present at all of the times. Mr. Steiger never heard ten years mentioned. [500] Mr. Mears, his own witness, and subsequently an employee of the plaintiff, testified that there was no mention of a ten-year period at that conversation. So I think under all the evidence there was no such contract as contended for by plaintiff.

I think the evidence shows that the arrangement with this plaintiff was that we would sell goods to him and he would resell to the commissaries and we would not have our salesmen selling to the commissaries.

Now, that's the whole arrangement between the parties. The first time, the evidence has shown, the first time that this plaintiff ever claimed to have a contract such as he is claiming here now, was

after Mr. Flynn's death, and then only after he was being hard pressed for the payment of these accounts. And the evidence shows that the arrangement between the parties—under the arrangement between the parties, this man was to pay for the goods within ten days, and that he didn't pay for the goods, and at the time of the termination and for some months prior to that, his indebtedness had been building up until finally there was nothing to say we can't deal with a man who can't pay us for the goods; we will get somebody else than can.

I think on the question of the contract it is clear that there is no such contract as is claimed by the plaintiff in this action. [501]

Now, there is no showing, too, that Mr. Flynn had any authority to enter into any such contract as is contended for by the plaintiff in this action. He had no authority from any officer, and Mr. Phillips never dealt with any officer of the Hunt Company.

The evidence also shows that under the arrangement between the parties, Mr. Phillips had no specific obligations. He wasn't required to purchase anything from the defendants. If he sat back and didn't order one case from the defendant, there wasn't a thing the defendant could do about it.

He testified that he had no minimum requirements; he testified that he was free, if he wanted to, to continue his bidding business. He testified that he cut down his bidding business; he was not required to cut down his bidding business. If he didn't cut down his bidding business, there was nothing that Hunt Foods could do about that. And so on

the question of mutuality, which is an important one here, all the plaintiff had to do, the defendant had to sell to the plaintiff if the plaintiff ordered something. But there was no duty on the plaintiff to order as much as one case from this defendant.

The statute of frauds, of course, we have raised here. The plaintiff—even just taking the plaintiff's testimony alone—has not established any grounds for an estoppel to plead the statute of frauds. To raise an estoppel, he has [502] to show that he suffered some unconscionable harm. Now, what he claims is he didn't make much profit in his year of operation. But that is not an unconscionable harm under the decisions.

He did not abandon his business; he was not required to abandon his business. He said he cut down some of his other, his bidding business. But cutting down under the cases, which we have cited in the memorandum on file, on the occasion of our motion to dismiss, the giving up of prior employment or a prior business or operating at a less-than-profit under the decisions is not an unconscionable hardship and does not entitle the plaintiff to assert an estoppel as against the statute of frauds.

Now, of course, the estoppel to plead the statute of frauds applies really to the level where Flynn is dealing with the plaintiff. Now, even if there were enough to establish an estoppel—let's say Flynn was an officer of the corporation and that the plaintiff had actually suffered some unconscionable harm, the question of estoppel then would be the only question. But now, Flynn, not being an

officer of the company, had to have an authority in writing to enter into the contract that the plaintiff claims was entered into, and in the absence of that authority, any representation made by Mr. Flynn to the plaintiff could not bind the corporation, because Mr. Flynn was not authorized [503] to make that kind of a contract and the representation of the agent, assuming that there were such, would not be enough to bind the company.

The Court: That point, of course, would only be applicable if the case stands or falls upon the claim that the contract was in terms to be performed more than a year after.

Mr. Cullinan: Yes.

The Court: Distinguished from a contract that might extend to that period, but was not by its terms to be performed for a period more than a year.

Mr. Cullinan: It would extend, too, your Honor, to a contract if it were held that what they were negotiating for or agreed to was a contract for a reasonable period of time. If that reasonable period of time was more than one year, then it would be a contract for more than one year and would come within the statute. If the reasonable time is less than a year——

The Court: I don't know what the California authorities are on that. I read your memorandum in connection with the motion; I don't think that that point was covered. I am not familiar with what the California authorities held, if there are any, on that subject.

Mr. Cullinan: Well, it is how long is the contract to continue; if it is to continue—— [504]

The Court: In other words, a determination of what is a reasonable time might not be a determination that could be made at the time the contract starts, because if you determine what is a reasonable time from all the facts and circumstances, you may have to take into account facts and circumstances that were not in existence at the time that the contract was entered into.

Mr. Cullinan: Of course, the question——

The Court: It depends on the nature, of course, of the contract.

Mr. Cullinan: The question is what did the parties agree to. If they agreed at the time to a contract for a reasonable period of time and if the reasonable period of time is more than one year, then they agreed to a contract that cannot be performed in one year.

The Court: Well, of course, there is one aspect of the case which would indicate that the arrangement was entered into with no time specified.

Mr. Cullinan: Yes, with no time specified, in which case it would be terminable at will.

The Court: Not necessarily. It depends on the nature of the contract and what it is that the parties were agreeing to do. It might be a contract that was intended to exist for a reasonable time under all of the circumstances of the relationship that is created by the parties at the [505] time.

Mr. Cullinan: *DuPont v. Clearborn*, an Eighth Circuit case, 64 Fed. 2d 255, pointed out that jobber

or dealer arrangements wherein no time is specified are arrangements that are terminable at will.

The Court: I think the rule, whatever it is in that case, has to be determined on the basis of what the case was before the Court. I don't think any court could lay down a rule in every case that would be true.

Mr. Cullinan: But certainly, taking all the evidence in this case, there is no evidence that the parties, first, none that they agreed for any ten years or any said number of years. Secondly, there is no evidence to show that they agreed this would continue for a reasonable period of time. All the evidence shows is that Phillips wanted to be a jobber to sell to the commissaries. Hunt's said, "O.K.; you can sell to the commissaries. We will sell to you and you can resell to them."

The Court: I think you have to assume, I think you have to start out with the assumption it was a contract which was mutually advantageous. I don't put too much faith in the idea that this was some suppliant that came to get a handout and was just a good-natured act on the part of the Hunt people to enter into this arrangement. It was an arrangement that had mutual advantages to them, each having [506] some benefits and some burdens in connection with it, whatever the relationship was. I think that is only fair.

Mr. Cullinan: Well, I think business men when they enter into any arrangement——

The Court: Whenever there is a controversy, one fellow says, oh, the other fellow did nothing;

he is no good; he beat his wife, or something. That's always what you find in these lawsuits when there is a disagreement afterwards. But usually, when business men get together, they at least think, when they enter into the contract, that each of them is going to get some advantage.

Mr. Cullinan: I think that's so, and I think that a jobber is willing to take a risk—most of them do—when they get into something that they think they are going to make some money out of it and they are willing to have it.

The Court: I don't want to interrupt your argument, because I will give you more, or course, time in connection with this, but we are taking a long time on a matter that seems to me maybe shouldn't have been in court, that it was a matter that business men ought to have sufficient capacity to adjust between themselves, these kind of sorry cases where a lot of technical questions come into the case.

Personally, my feeling in the matter is that there are grave legal obstacles, which may be overcome—I don't know—to the plaintiff's recovering, but I don't think he got a [507] very good deal from the Hunt Company, because he built up a business there which they spoke of, as I mentioned before, in glowing terms and when things were moving along pretty well. His account, it is true, had a big debit side to it, but it was being built up and Hunt was getting twice as much business as they got before. Because the grass looked greener in this bigger field, why, for that reason they suddenly shut him off and legally they may be right. I only mention

this because I think this is the kind of business controversy that deserves a less technical and perhaps more equitable and perhaps a little sentimental consideration in working this out.

Mr. Cullinan: Well, of course, the provision of the——

The Court: I know. You think on the side of Hunt's that this is an afterthought and he couldn't pay up the full balance of the contract so he jockeyed up this idea of suing Hunt for it. Well, a lot of times that's what lawyers are for. I know, at least in my experience in practicing law, sometimes a man doesn't realize that maybe he has some kind of a claim until he is pushed hard and then he goes to a lawyer—usually it is long after the barn door is shut—and maybe his belated advice then appears to the other side, sometimes, because it is belated, to be wholly unmeritorious. What I have just said, Mr. Cullinan, is not very much on the legal side of the case, I appreciate that. [508]

Mr. Cullinan: Well, on the same side of the case, not the legal side, your Honor, on the other hand, Hunt's is not in the business of being a banker for some jobber. They tried to go along with this man. He got way behind in his accounts.

The Court: Let me interrupt you. If I thought that was the reason why this relationship was discontinued, I would not have made the remarks I made. I think the truth of the matter is, and I can only judge that from what I hear, and maybe there are other things that I don't know anything about,

but from what I have heard here, I am satisfied that the status of the account had nothing whatsoever to do with the ending of this man's activities with the company. It came about because they had another method of handling it that they thought was more profitable and a better way of handling it, and it's their right to do that. But that was the reason for it, because Mr. Miller and one of the other men had no hesitancy in saying that the status of the account was not mentioned as the reason, to Mr. Phillips, in discussions, for the discontinuance of the thing. His account had a larger debit balance than it had in the early stages of it, but that amount, as I looked over the statement, was an average that had gone on for a long, considerable period of time before the Hunt people decided to enter into this larger activity with respect to the sales to the commissaries, [509] but I don't think that had anything to do with the matter.

Mr. Cullinan: Well, they had tried to work out various arrangements; they had tried that accounts receivable device, which didn't work out. As the evidence shows, he did make promise of payments, correspondence is full of promises.

The Court: He was about three or four months behind, there was long periods of time there in the collections, and I think Hunt knew that, and it was worth something to them, must have been, to have this business increased. All that was involved there was interest on their money during that period of time and I suppose if any business was worth that,

worth getting for them, that that could have been absorbed in the cost of doing the business.

But I must apologize for taking so much time talking about a non-legal phase of this case. I have seen before cases where business men get into these quarrels where they would be better, and sometimes they do, even in the court and after litigation, to dispose of them themselves.

As I see the legal problems in the case, the main problem, of course, is what was the contract or agreement or understanding that was had, what is the truth of that, and secondly, the question of—depending upon what was the actual agreement, what law applies, and then if, under any of [510] those segments of the case, it would appear that there was a contract which has legal validity to it and it was breached, what, if any, damage did the plaintiffs suffer. All three of those things present some difficulty in figuring out.

I just made this statement to you, Mr. Cullinan, so as to save argument about the facts of the matter because if this was a contract that was for a period of years, if the Court accepts that statement of the plaintiff as being what was said at the time, then you have the legal problem of whether or not, as you have argued, there was sufficient to show that that agreement is taken out of the statute of frauds.

If, on the other hand, the Court were to accept the theory of fact to be, the truth to be that they went into this arrangement and he was given this exclusive jobbing status and no time at all was spe-

cified, as to what legal relationship resulted from that.

Mr. Cullinan: Yes.

The Court: Since there was no corroboration of the plaintiff's statement with respect to this long term contract, I'm more inclined to think that there was no time specified, that this contract was, by its very nature—I should say—or relationship—by its very nature was one that would extend for a substantial period of time and that a substantial period of time would be a reasonable period of [511] time in view of what the plaintiff was undertaking to do and the knowledge of the defendant of what he was undertaking to do, that it was an arrangement that both sides anticipated would run for a substantial length of time, and the best evidence of that is that it did run for a year and a half and then was discontinued because, as I say, some more rosy picture was opened.

Mr. Cullinan: Well, of course, whatever arrangement they had, this plaintiff had breached it by not making the payments because certainly his statement that the credit manager, hardly knowing the man and having a 1950 statement that covered three months, saying to him, "Pay when you are able; there's no credit limit," that is just a totally unbelievable statement. A credit manager wouldn't last very long if he were to make that kind of a deal.

The Court: I don't think the relationship depends necessarily on what the credit manager said. It is what they did that indicates, at least that was the way they were proceeding, that there was some

dissatisfaction on the part of Hunt's that more prompt payments weren't being made but they still continued to carry on, and I think there was some recognition that there were difficulties, that a man that had a large amount of capital wouldn't need to go; they couldn't get someone, in my opinion, that would carry on the kind of pioneering work that had been done to make some [512] money out of this thing—they couldn't get that arrangement with some fellow that had fifty or a hundred thousand dollars; he didn't need Hunt's to enter into that kind of an arrangement. So it necessarily meant someone had to pioneer for a while and that's what happened here. [512-A]

Mr. Cullinan: Yes, the plaintiff who wants to pioneer should have resources to do it and shouldn't depend on the defendant to finance him, and that's what it developed into.

The Court: I don't know if I would agree with you. That's the very cold point of view of the hardheaded didactic credit manager. I sympathize with that point of view; he has a special job to do. But it doesn't necessary follow as a matter of business that that's so.

Well, I don't know whether that has been helpful or not. If you would prefer to write authorities on the legal aspect of this matter——

Mr. Cullinan: Well, I think there are so many involved, the easier way to do it, so that your Honor would have each point and all the authorities pertinent——

The Court: I think you might concentrate on the question of whether the contract that was to be performed within a reasonable time, what is the application of the law to that, and also I think it would be well to point out that if there is a breach, have damages been shown.

Mr. Cullinan: Yes.

The Court: It is a very difficult question. Authorities have all recognized for a long time that is a difficult question. There may be some evidence here that would warrant inferring that there would be some profits here of an accumulative nature in the future. [513]

Mr. Cullinan: There is, of course, also the question here as to whether there was any kind of a contract at all, whether it was just a business arrangement that either party could terminate. That's one of the legal questions.

The Court: It is a question of how you use the word "contract." A layman always thinks of a contract as a piece of paper that has got some writing on it, but of course there are other kinds of contracts. We can refer to it as a relationship under which the parties agreed to certain mutual obligations. In a general sense it is still a contract, if it has mutuality to it, if it complies with the statutes, such as the statute of fraud, or otherwise by other law taken out of reach of the statutes.

Mr. Cullinan: Of course, the questions here are whether there was a contract for any period of time, whether there was a contract for a reasonable time, or whether there was no contract at all for any

period of time, just as an arrangement to make some sales to a man who is going to resell them.

The Court: Well, if that were the situation I would agree with you, but the evidence in this case, it seems to me, is pretty convincing this wasn't just a case where a man was buying merchandise from somebody, isn't a suit for a purchase price of something of that sort. This is an arrangement by which, for certain considerations, the man was given exclusive representation on the part of Hunt's to sell exclusively, and [514] no one else, as their jobber, to the commissaries. So it's more than just a relationship, more than just a situation to buy and sell merchandise one to the other.

Mr. Cullinan: Except, though, your Honor, we don't say at one and the same time——

The Court: If that were the case, I don't think we would be here, because Hunt's must have a thousand customers, more or less. They don't do business with them on a relationship that existed here.

Mr. Cullinan: We don't say to them, though, by the same token we don't say to them, "Now, you must stop all your other business."

The Court: No.

Mr. Cullinan: "And just concentrate on working for Hunt's."

The Court: But the evidence does show that Hunt's felt that it was too costly to them to have their own salesmen representing them in these transactions with the commissaries, that there was an advantage to them to take their own salesmen

off and to handle this business which they thought might be developed into a profitable business by a man, as a jobber, who, buying from them, would build up that business with the commissaries. They must have considered that, because they sent these notices out explaining why they were doing it to the commissaries. [515]

Mr. Cullinan: Those notices, of course, were like a calling card; they let a person know I'm selling Hunt's products in this particular establishment. I don't think that that bulletin has any more status than an ordinary calling card, that a man goes in and he says, "I am representing Hunt's and selling Hunt's products." But Hunt's reason, obviously, for starting with Phillips was not that it was so costly for them to handle the commissary, they just wanted to make their salesmen available for other work.

The Court: It was to their advantage; I wasn't using the term "costly" in the dollars and cents sense, but merely that it was time, other elements, not worth their while. So therefore they were at least amenable—they may not have been seeking this arrangement, but they were amenable to it and they considered it to be an arrangement that added advantages to them.

Mr. Cullinan: I think Hunt's wouldn't go into any arrangement if they didn't think they were going to get some advantage from it in one form or another, of course. I will be glad to submit—— [516]

The Court: Would it be satisfactory to you, counsel, to write a brief?

Mr. Rothert: I am not sure I understand what the proposal is. I am waiting my turn. I know that your Honor doesn't wish a full dress argument on the facts and I won't impose on your Honor's time or attention; but I did have a feeling of misgiving here after listening to the discussion on the facts, and I am wondering whether your Honor would arrive at some definite decision on the facts in his mind without my having a chance to make some presentation.

The Court: Whatever I have expressed on the facts is favorable to your client.

Mr. Rothert: Yes, I understand, although——

The Court: I make no bones about telling you that. It is the legal question that bothers me.

Mr. Rothert: I recognize that, your Honor, but what I mean is I don't agree at all with what Mr. Cullinan states as to what the evidence shows on the fact, and I wouldn't want to burden the Court with addressing myself to the facts if it isn't going to be of any help. But I am willing and I am anxious to present any type of written memorandum or otherwise that your Honor thinks will be of assistance in determining the issues in the case. And whether it will be presented in the usual form of plaintiff opening or whether it will be presented as a matter of a motion to dismiss so that the [517] defendant opens, it makes no difference to me.

The Court: I don't care either in that regard. I think that really the matter arises on the defendant's reserved motion to dismiss the case, because if the motion to dismiss is granted that disposes of the

case. If it is denied, there will be left then only the question as to the sufficiency of the evidence as to damages. So I would offhand think that perhaps it would be better to present the motion first.

Mr. Cullinan: Yes, your Honor.

Mr. Rothert: In the nature of a reserved motion to dismiss at the end of the plaintiff's case?

The Court: That's right, because you recall that——

Mr. Rothert: Yes, I do recall, that was reserved.

The Court: I told him to present his evidence.

Because the legal questions as to the plaintiff's case, exclusive of the question of damages, which is a mixed question of law and fact——

Mr. Rothert: That's right.

The Court: Aside from that the main question of law arises on the motion to dismiss.

Mr. Rothert: As I understand it, the motion to dismiss at the end of the plaintiff's case considers the facts with the deductions and inferences most favorable to the plaintiff. The very brief discussion on that motion held this morning wasn't on that assumption from the facts, but—— [518]

The Court: There really is no great dispute of facts in this case on the main issues. There is a variety of viewpoints on the testimony as to what was said in the meetings from which the relationship or agreement of the parties was said to have grown or emerged. But aside from that, there isn't any great factual issue here—a lot of collateral

matters that go to the heart of the matter as to what was the understanding of the parties.

Mr. Cullinan: I think the practical and expeditious way to handle the presentation would be for me under the discussion here to withdraw the motion and just——

The Court: Submit the case?

Mr. Cullinan: Submit the case, because we have——

The Court: We have some questions——

Mr. Cullinan: There is going to be factual discussion as well as legal discussion.

The Court: I think perhaps you are right. You write the opening memorandum.

Mr. Rothert: Yes, your Honor.

The Court: And treat it as if the case were submitted. If the case is decided in favor of the defendant, we will say, it doesn't make much difference whether it is on a motion to dismiss after all the evidence is in or whether it is on the merits.

Mr. Rothert: On the submission, yes. [519]

The Court: It is not going to make any difference. So I guess you had better take it in the ordinary way.

Mr. Rothert: All right.

The Court: But I think the main question is as I have said on——

Mr. Rothert: I have understood your Honor's comments on it. I think it is helpful to both attorneys in the preparation of the memoranda.

In presenting the opening memorandum for the plaintiff I would ordinarily consider the legal

points that were already argued in the motion to dismiss on the pleadings, and I see only one other legal point has been raised today and that is, that in addition to the lack of written contract, it is now contended that there must also be written authority through Mr. Flynn.

The Court: That is right; that is an additional point.

Mr. Rothert: That is the only one I recognize as a new point.

The Court: On the allegations of the complaint I feel that Judge Harris' decision was correct in denying the motion, and now there is a question as to whether or not the evidence presented is sufficient of course to sustain contention of the estoppel.

Mr. Rothert: I understand that, yes, your Honor.

The Court: I think you should present it. [520]

Mr. Rothert: How much time may I have to present the opening?

The Court: What do you say, ten days—ten, ten and five, or something like that?

Mr. Rothert: Yes, that will be satisfactory with me.

The Court: Will that be all right with you, counsel?

Mr. Cullinan: I am just trying to figure when Christmas comes.

The Court: I was looking at the calendar, too.

Mr. Rothert: Twenty days from now is the 22nd.

The Court: Well, I think maybe you might take 15 days, and then if you take 15 days to reply——

Mr. Cullinan: Fine.

The Court: You won't have to work over the Christmas period, then.

Mr. Rothert: Fifteen, fifteen and——

The Court: What?

Mr. Rothert: One week, seven days?

The Court: Fifteen, fifteen and ten.

Mr. Rothert: That is adequate, yes, your Honor.

The Court: Is that all right?

Mr. Cullinan: Yes, your Honor.

The Court: Also I would suggest in the interval, as you approach the Christmas season you might go outside and buy each other a cup of coffee and maybe you might have a little discussion among yourselves about this case. [521]

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 521 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ F. SWEENEY,

/s/ W. A. FOSTER,

/s/ R. D. NORTON.

[Endorsed]: Filed April 25, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys:

Excerpt from Docket Entries.

Petition for Removal from the Superior Court of the State of California in and for the County of Alameda, with copy of complaint and summons attached.

Bond on Removal.

Answer, counterclaim and cross-complaint of Hunt Food, Inc.

Answer of plaintiffs to counterclaim and cross-claim of defendant.

Motion of defendant to dismiss and for judgment on pleadings.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Defendant's Proposed Modifications to Findings of Fact, Conclusions of Law and Judgment.

Memorandum of Costs of Plaintiff.

Memorandum of Costs by Defendant.

Notice of Appeal.

Supersedeas Bond.

Statement of Points Upon which Appellant Intends to Rely on Appeal.

Appellant's Designation of Record on Appeal.

Appellees' Designation of Record on Appeal.

Reporters' Transcript of Proceedings Nov. 28, 29, 30, Dec. 1 and 2, 1955.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ and AR.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of July, 1956.

C. W. CALBREATH,

Clerk;

By /s/ MARGARET P. BEAN,

Deputy Clerk.

[Endorsed]: No. 15216. United States Court of Appeals for the Ninth Circuit. Hunt Foods, Inc., a Corporation, Appellant, vs. Wellington Phillips and H. W. Liholm, Appellees. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: July 27, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,216

HUNT FOODS, INC.,

Appellant,

vs.

WELLINGTON PHILLIPS and H. W. LIHOLM,
Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
MATERIAL TO THE CONSIDERATION
OF THE APPEAL

Hunt Foods, Inc., Appellant, hereby adopts the "Concise Statement of the Points on Which Appellant Intends to Rely on Appeal," filed in the District Court of the above-entitled matter on June 27, 1956, and entered in the typewritten record, as and for its statement of points required under Rule 17(6), and hereby adopts the "Designation of Contents of Record on Appeal," filed in the District Court of the above-entitled matter on June 27, 1956, and appearing in the typewritten record, as and for its designation of record material to the appeal herein, as required by Rule 17(6).

EUSTACE CULLINAN,
BEN C. DUNIWAY,
VINCENT CULLINAN,

By /s/ EUSTACE CULLINAN,
Attorneys for Appellant.

[Endorsed]: Filed January 31, 1956.

No. 15,216

IN THE

United States Court of Appeals
For the Ninth Circuit

HUNT FOODS, INC.,

Appellant,

vs.

WELLINGTON PHILLIPS
and H. W. LIHOLM,

Appellees.

BRIEF FOR APPELLANT.

CUSHING, CUSHING, DUNIWAY & GORRILL,
1 Montgomery Street, San Francisco 4, California,
Attorneys for Appellant

FILE

NOV 23 1956

PAUL P. O'BRIEN, CL



Subject Index

	Page
Statement of jurisdiction	1
District court	1
Court of Appeals, Ninth Circuit	2
I. Concise Statement of the case	2
(A) Summary of the facts	2
(B) Summary of legal questions	6
II. Specification of errors in the findings	7
(A) Errors relative to appeal from judgment award- ing appellant only \$11,495.16, and omitting in- terest, attorneys' fees and costs	7
(B) Errors relied upon in appeal from judgment awarding damages to Phillips	8
Specification No. 1—Findings relating to the na- ture of the arrangement	8
Specification No. 2—Findings relating to estop- pel	10
Specification No. 3—Findings on performance and breach	12
Specification No. 4—Findings relating to the na- ture and origin of damages	12
Specification No. 5—Findings relative to Hunt's knowledge of the agreement	14
Specification No. 6—Findings relating to basis for computing damages	15
Specification No. 7—The court incorrectly ap- plied the law	17
III. Concise argument of the case	17
1. The reason for termination need not be stated to the other party	17
2. The arrangement was terminable at will	18
3. Lack of mutuality makes the contract terminable at will	20

	Page
(a) Phillips right to concentrate on other business	20
(b) Phillips could not be forced to buy from Hunt	21
(c) An agreement to "promote the sales" is not sufficient consideration for a promise to keep Phillips as a jobber for an unspecified period of time	22
(d) Phillips engaging in a new business	23
(e) Part performance does not supply mutuality	23
(f) Exclusive dealership does not cure lack of mutuality	24
4. The statute of frauds is a defense and estoppel is not applicable	25
5. Any term, indefinite or not, which is for more than a year is within the statute	28
6. No one had authority to bind Hunt for more than one year	30
7. Prospective damages not awarded to a new enterprise	34
8. There is no evidence to support a damage award to Phillips	35
(a) The best possible proof must be given	35
(b) Guesses and conjectures are not sufficient ...	35
(c) Contingent future bargains rendered damages uncertain	37
(d) Phillips' dilemma	38
(e) Fatal lack of proof of Phillips' expense of doing business	39
(f) No proof of profits or losses after termination was introduced	40
(g) No proof of ability to perform	41
Conclusion	42
Appendix	

Table of Authorities Cited

Cases	Pages
A. Santaella & Co. v. Lange Co. (C.C. 8th), 155 F. 719 ...	23
Alexanders Dept. Stores, Inc. v. Ohrbach, Inc. (1945), 56 N.Y.S. (2d) 173, 269 A.D. 321	39
Allen v. Gardner (1954) 126 Cal. App. (2d) 335, 272 Pac. (2d) 99	35
Anderson v. Standard Lumber Co. (1923), 64 Cal. App. 410, 1 Pac. 495	31
Austin v. Roberts (1933) 130 Cal. App. 328, 20 Pac. (2d) 97	36
Baumer v. Franklin Co. Distilling Co. (C.C. 6th, 1943) 135 Fed. (2d) 384	36
California Press Mfg. Co. v. Stafford Packing Co. (1923) 192 Cal. 479, 221 Pac. 345	34
Caspary v. Moore (1937) 21 Cal. App. (2d) 694, 70 Pac. (2d) 224	36
Central Coal & Coke Co. v. Hartman (C.C. 8th) 111 Fed. 96	39
College Point Boat Corp. v. U. S. (1925) 267 U.S. 12, 45 Sup. Ct. 199, 69 L. Ed. 490	17
Curtiss Candy v. Silberman (C.C. 6th, 1933) 45 Fed. (2d) 451	18, 19, 24
Domas Realty Co. v. 3440 Realty Co. (1943), 40 N.Y.S. (2d) 69, 179 Misc. 749	26
Dunlap v. Dean (1930) 109 Cal. App. 300, 292 Pac. 991 ...	33
E. I. Du Pont De Nemours & Co. v. Claiborne (1933) 64 Fed. (2d) 224	21, 29
Elkwood Lumber Co. v. Moore Well & Lumber Co. (1938), 97 Fed. (2d) 402	31
Ellerson v. Grove (C.C. 4th, 1930) 44 Fed. (2d) 493	39
Fibreboard Products v. Townsend (C.C.A. 9th, 1953), 202 Fed. (2d) 180	28
Fireside Marshmallow Co. v. Quinlan (C.C. 8th, 1954) 213 Fed. (2d) 16	39
Fitzgerald v. First National Bank (8th Cir., 1902) 114 Fed. 474	19

	Pages
Ford Motor Co. v. Kirkmyer Motor Co. (1933) 65 F. (2d) 1001	19
Friedman v. McKay Leather Co. (1919) 179 Cal. 566, 178 Pac. 139	20, 36
Gibson v. Hercules Mfg. & Sales Co. (1927) 80 Cal. App. 689, 252 Pac. 780	35
Hancock Oil Co. v. McClellon (1955), 135 Cal. App. (2d) 667, 288 Pac. (2d) 39	23
Hartley v. Weller (1951) 104 Cal. App. (2d) 118, 231 Pac. (2d) 133	35
Hoffman v. Pfingsten (Wis. 1951), 50 N.W. (2d) 369, 260 Wis. 160, 26 A.L.R. (2d) 1132	20
Huffman v. Paige-Detroit Motor Co. (C.C. 8th, 1919), 262 F. 116	22
J. A. Folger Co. v. Williamson (1954), 129 Cal. App. (2d) 184, 276 Pac. (2d) 645	23
Jackson v. Alpha Cement Co. (1907), 106 NYS 1052	23
Jeppi v. Brockman Holding Co. (1949), 34 Cal. (2d) 11, 206 Pac. (2d) 847	31
Jordan v. Buick Motor Co. (7th Cir.) 75 Fed. (2d) 447 ..	19
Lawrence Block Co. v. Polston (1954) 123 Cal. App. (2d) 300, 266 Pac. (2d) 856	23
Leach v. Kentucky Coal Company (1919), 256 Fed. 686	22
Lewis-Hale Co. v. Enterprise Fuel Co. (4th Cir. 1929) 33 Fed. (2d) 727	38
Little v. Union Oil Co. (1925), 73 Cal. App. 612, 283 Pac. 1066	27, 28
McDorman v. Moody (1942), 50 Cal. App. (2d) 136, 122 Pac. (2d) 639	41
McGregor v. Wright (1931) 117 Cal. App. 186, 3 Pac. (2d) 624	38
Morrison v. Land (1951), 169 Cal. 580, 147 Pac. 259	28
Mortgage Guarantee Co. v. Chotiner (1936), 8 Cal. (2d) 110, 64 P. (2d) 138	32
Oakland Motor Co. v. Indiana Auto. Co. (C.C. 7th, 1912) 201 Fed. 499	22

TABLE OF AUTHORITIES CITED

v

	Pages
Palmer v. N. Y. Herald (1929), 239 N.Y.S. 619	40
Palmer v. Phillips (1954), 123 Cal. App. (2d) 291, 266 Pac. (2d) 850	27
Parke v. Frank (1888) 75 Cal. 364, 17 Pac. 427	36
Rapidol v. Howe (Wash. 1927) 258 Pac. 469	40
Royal v. Chicago Streamlite Co. (7th Cir., 1950) 178 Fed. (2d) 81	25
Ruinello v. Murray (1951) 36 Cal. (2d) 687, 227 Pac. (2d) 251	18
Schick Service v. Jones (C.C. 9th, 1949), 173 Fed. (2d) 969	27
Schmitt v. Continental-Diamond Fibre Co. (C.C. 7th, 1940) 116 Fed. (2d) 779	36
Scott v. Cline Electric Manufacturing Company (1930), 104 Cal. App. 122, 785 Pac. 349	23
Seymour v. Oelrichs (1909) 156 Cal. 782	32
Skuper v. Imperial Irrig. Dist. (1939) 33 Cal. App. (2d) 392, 91 Pac. (2d) 910	39
Stephany v. Hunt Brothers (1923) 62 Cal. App. 638	36
Stepp v. Williams, 52 Cal. App. 237, 198 Pac. 661	25
Velie Motor Co. v. Kopmeier (C.C. 7th, 1912), 194 Fed. 324	22
Victor Talking Machine v. Lacher (Minn. 1915), 150 N.W. 790	24
Watson v. Oregon Moline Plow Co. (Ore. 1924) 227 Pac. 278, 112 Ore. 414	41
Western Auto Supply v. Sullivan (C.C. 8th, 1954) 210 Fed. (2d) 36	18
Willard Southland & Co. v. United States (1922) 262 U.S. 489, 67 L. Ed. 1086	19
William C. Atwater & Co. v. United States (1922) 262 U.S. 495, 67 L. Ed. 1089	19
Woerhide v. Barber Asp. Pav. Co. (C.C. 8th, 1918) 251 Fed. 196	22

Codes

California Civil Code, Section 1624(1)	25, 30
California Civil Code, Section 2309	30

Texts

	Page
12 Amer. Jur. 889	41
15 Amer. Jur. 557	38
15 Amer. Jur. 574	39
26 A.L.R. (2d) 1139 at 1141	23
2 Cal. Jur. (2d) 700	33
23 Cal. Jur. (2d) 421	26
23 Cal. Jur. (2d) 423	27
25 C.J.S. 519	34
Restatement, Contracts, Sec. 278	18
Restatement, Contracts, Sec. 331, comments c and e	35
Sedgwick, Damages, 9th Ed., Sec. 171	35
Sedgwick, 9th Ed., Sec. 197, p. 9378	38

No. 15,216

IN THE

United States Court of Appeals
For the Ninth Circuit

HUNT FOODS, INC.,

vs.

WELLINGTON PHILLIPS
and H. W. LIHOLM,

Appellant,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

District Court.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Southern Division, in a civil action awarding plaintiffs \$21,500 for damages for breach of oral contract. It is also an appeal, in the same action, from a judgment in favor of defendant Hunt Foods, Inc. for \$11,495.16 due on trade acceptances in that said judgment failed to award defendant \$2,029.63 interest from the due date of the trade acceptances and failed to award defendant attorney fees pursuant to the terms of the trade acceptances.

The complaint for damages for alleged breach of oral contract was filed in the Superior Court of Alameda County, California, asking damages against appellant in the sum of \$380,000 (Trans. pp. 16-17) and was removed to the said District Court by defendant Hunt Foods, Inc., a Delaware corporation, appellant here, under Sections 1441 and 1446 of Title 28 U. S. Code (Trans. p. 6). Thereafter appellant filed in the said District Court its answer, counter-claim and cross-complaint (Trans. p. 19), alleging the actual arrangement between the parties and pleading, among other things, three trade acceptances in appellant's favor on which the principal amount due was \$11,495.16. The District Court had jurisdiction under Sec. 1332, Title 28, U. S. Code.

Court of Appeals, Ninth Circuit.

The judgment of the District Court was entered June 7, 1956. Notice of appeal was filed June 18, 1956. Appellant's bond was approved by the trial judge and was filed June 18, 1956. Under Rule 73(a) and Sec. 1291, Title 28, U. S. Code this Court has jurisdiction.

I.

CONCISE STATEMENT OF THE CASE.

(A) SUMMARY OF THE FACTS.

The appellees are a limited partnership composed of Wellington Phillips, H. W. Liholm, general partners, and Overseas Trading Corporation, limited partner. The appellant is a Delaware corporation doing

business in California and throughout the United States in the canning and selling of foodstuffs. From October, 1950, when appellees first entered business, until December, 1951, the partnership was engaged partly in selling foodstuffs as a broker but principally was engaged in what is known as a "bidding business", i.e. bidding on food items in the grocery field according to specification and not according to brand. Such a type of business is substantially different from the sale of items by brand to government commissaries.

As of December 1, 1951, the partnership, through Phillips, was designated orally by one Flynn, the district manager of appellant's Hayward sales office as a jobber to purchase and resell Hunt products to 21 specified government commissaries. This was an entirely new type of business for appellees.

The appointment was exclusive only in the sense that Hunt itself would not have its three salesmen sell to these specific commissaries. It was *not* exclusive to the extent of limiting the regular business of appellees, and appellees were free to sell competitor's products except as a jobber to the specified commissaries.

Phillips is the only partner that anyone at Hunt has ever seen or communicated with. Appellees' case is based on Phillips' testimony of the conversations he had with Flynn, the district manager of the Hayward sales office of appellant. Therefore, for convenience sake, we will sometimes refer to appellees, collectively, as Phillips and to appellant as Hunt.

Flynn died in December 1953 long before Phillips asserted any contract. The oral arrangement was not made with any executive of Hunt and no officer of Hunt knew of any contract such as that asserted in this action. In so far as the officers of Hunt knew, that company was selling some products to Phillips who resold to government commissaries, either party being free to discontinue at any time.

Appellees commenced operations for Hunt in December, 1951 and the arrangement was terminated by Hunt in April, 1953. The Court found that the arrangement was for an indefinite period and that, when Hunt terminated sales to Phillips after 16 months of operation, it had breached the contract because the oral contract was to run for some longer but undetermined period of time.

Under the oral contract, as testified to by Phillips, he could not be required to purchase any quota or other minimum amount of goods from Hunt. Under the oral contract, as shown by the uncontradicted evidence, Phillips was free to and did continue to carry on his brokerage and bidding business for customers other than Hunt. During the first year of the period Phillips handled Hunt's products, he did over a quarter of a million dollars in his "bidding" business involving products of other manufacturers and he increased his profits on brokerage for others by 40%.

Virtually from the start of their relationship, Phillips failed to pay when due for merchandise de-

livered. Every credit arrangement was violated by him. At the time of termination, in April, 1953, he owed Hunt approximately \$25,000, much of which was owed for goods delivered by Hunt four months earlier. This default justified termination.

Phillips never had the financial resources to handle the job undertaken. He could not continue unless Hunt undertook to be a banker, a task which could not and was not assumed by Hunt.

There is a complete absence of evidence to support a finding of damages to appellees. There is nothing in the record to show the actual sales of Hunt products made by Phillips in the 16 months. There is no evidence of the actual profit made by appellees on these sales. There is no evidence of appellees' expense of handling the Hunt account. Phillips relies upon guesses, surmises, and speculation in place of introducing the actual facts of his performance.

Subsequent to termination, Phillips made payments on the Hunt balance so that by August, 1953, the balance due Hunt was reduced to \$13,319.37. Phillips then accepted three trade acceptances each in the sum of \$4,439.79, representing this balance due to Hunt. These acceptances were due, respectively, on October 1, 1953, November 1, 1953, December 1, 1953. Phillips paid \$1,824.21 on the first trade acceptance. The balance of \$2,615.55 on this acceptance was never paid, and no payments were ever made on the other two acceptances, leaving \$11,495.16 principal due. Each of the trade acceptances provided for reasonable attorneys' fees if suit were instituted for collection.

The Court awarded Hunt judgment for the principal balance of \$11,495.16 due but failed to include interest from maturity date or attorneys' fees, as provided in the documents. The Court also awarded Phillips \$21,500 damages but the Findings do not show any basis for computation of damages.

(B) SUMMARY OF LEGAL QUESTIONS.

- (1) Reason for Termination need not be stated
- (2) The Arrangement was terminable at will
- (3) Lack of Mutuality makes the contract terminable at will
- (4) The Statute of Frauds is a Defense and Estoppel is not applicable
- (5) Any term, indefinite or not, which is for more than a year, is within the statute
- (6) No one had authority to bind Hunt for more than one year
- (7) Prospective damages not awarded to a new enterprise
- (8) There is no evidence to support a damage award to Phillips
 - (A) The best possible proof must be given
 - (B) Guess and conjecture are not sufficient
 - (C) Contingent future bargains render damages uncertain
 - (D) Phillips' dilemma

- (E) Total lack of proof of Phillips' expense of doing business
 - (F) No proof of profit or losses after termination
 - (G) No proof of ability to perform
-

II.

SPECIFICATIONS OF ERRORS IN THE FINDINGS.

There were many material errors in the Findings. The District Court also failed to find on several material issues.

The Findings, as signed, are at pages 36 to 42 of the Transcript of Record. Appellant duly filed proposed Modifications of Findings (Tr. pp. 43-53) and the reasons therefor, none of which were adopted.

(A) ERRORS RELATIVE TO APPEAL FROM JUDGMENT AWARDING APPELLANT ONLY \$11,495.16, AND OMITTING INTEREST, ATTORNEYS' FEES AND COSTS.

Finding XII (Trans. p. 41) makes no reference to the provisions of the Trade Acceptances under which Phillips was bound to pay all costs of collection including attorneys' fees and fails to award attorneys' fees. This Finding also fails to specify interest on the liquidated amounts from date of maturity. Computation of the interest and attorneys' fees is set forth in

Appellant's Proposed Modification to this Finding (Trans. pp. 50-52).

(B) ERRORS RELIED UPON IN APPEAL FROM JUDGMENT
AWARDING DAMAGES TO PHILLIPS.

Specification No. 1—Findings relating to the nature of the arrangement.

Finding III (Trans. pp. 37-38) finds that Phillips was orally appointed an exclusive jobber for Hunt's to purchase and resell Hunt products to designated commissaries for an unspecified period of time commencing December 1, 1951 and that Phillips agreed to promote the sale of Hunt products and to perform the duties and obligations of an exclusive military jobber.

The alleged oral contract was made in the course of conversations between Phillips and one Flynn, then sales manager of the Hayward office of Hunt (Trans. p. 170). (Since Flynn died in December 1953 (Trans. p. 432) long before Phillips asserted any oral contract, the only direct testimony of what was agreed to is that of Phillips himself.)

Phillips says he told Flynn that he was willing to buy Hunt products and resell to the commissaries in Northern California if he could be assured of having the arrangement for a 10-year period (Trans. p. 103) because he would probably make little profit at first. The Court disbelieved him on this and held that an arrangement for an indefinite period resulted. Phillips could resell at any price he thought desirable (Trans. p. 121); there was no quota or

minimum amount of purchases. Phillips testified as follows (Trans. p. 232):

“Q. Was there any minimum number of purchases that was established; that you would have to purchase any minimum amount of canned goods?

A. None.”

Phillips retained the right to devote as much time as he wished to work for others in his regular business—bidding and brokerage. How substantial a business he did for others while handling Hunt products will be shown in the discussion under the next succeeding specification of error.

There is no evidence as to what are the “duties and obligations” of a jobber or whether they were ever discussed; hence the finding is without basis. The complaint alleges only that appellees agreed to “promote the sales” [Par. IV (4) Trans. p. 11]. There was no “compensation” payable to appellees.

Phillips’ conduct at and subsequent to termination shows there was no contract that was to continue. It is significant that at this termination meeting Phillips did *not* claim he had any contract or other non-terminable arrangement with Hunt (Trans. p. 427). He accepted the fact of termination. In the nine months between the date of termination and early 1954, numerous letters (e.g. Ex. H, I, J, K) passed between the parties. *In none of these does Phillips claim any contract.* He introduced a copy of a *purported* letter dated March 14, 1953 to Mr. Miller (Exhibit 6). This was never received at Hunt’s (Trans. p. 453). Phillips never mentioned it in Ex-

hibit H, his letter of a month later, nor did he mention that letter thereafter.

The authorities holding that the arrangement is terminable at will are collected in Sections 2 and 3 of the Argument, *infra*.

Specification No. 2—Findings relating to estoppel.

Findings IV and V (Trans. pp. 38-39) are that at the time the oral agreement was made, Phillips advised that he would sell without substantial profit for about two years and that he would eventually abandon his bidding business and that, in performing, Phillips substantially abandoned his bidding business and did sell quantities of Hunt products without substantial profit. It will be noted that the Findings are *not* that Phillips was *required* to do either of these.

The finding that Phillips would sell “without substantial profit” is meaningless because there is no evidence of what a “substantial” profit is. Furthermore, there is no evidence of what profit appellees actually made on their Hunt sales nor of expenses. Detailed discussion of the insufficiency of evidence on profits is in the Appendix, Part II.

Some note should be made here of Phillips testimony that there was *no profit trouble for him* (Trans. p. 367).

Phillips was free to and did continue his bidding and brokerage business. During the first year, 1952, of the Hunt arrangement, Phillips did *over a quarter of a million dollars sales* for others in bidding and brokerage; a \$253,175 volume in the bidding business

against \$94,000 in Hunt sales (Trans. p. 360). In *addition* to this, he increased his profits as broker for others than Hunt, by 40%, from \$2,773.43 in 1951 to \$3,906.15 in 1952 (Trans. p. 361). He actually took on extra help for the brokerage work (Trans. p. 239). So his bidding business and his brokerage business constituted more than 75% of his total business for the year, leaving the Hunt account as virtually a sideline.

Furthermore, the evidence does not show any *need* to curtail appellees' other business. The new venture with Hunt only required infrequent visits to commissaries (Trans. p. 149), which were virtually within a small geographic triangle with the respective points at San Francisco, Sacramento and Monterey. Twenty-one commissaries were designated as those to which Phillips might resell Hunt products (Ex. AM) but, so far as the evidence shows, Phillips sold only to Alameda, Ord, Hamilton (few months), Camp Cook (two sales), and Lompoc (two sales).

Prior to asking for the Hunt business, Phillips had said the bidding business was falling off and he was seeking other types of business to fill the gap (Trans. p. 267). So far as the proof goes *that* was why the business *might* decrease. *There is no evidence that Phillips voluntarily cut down the business.*

Under the rules of law discussed in Sections 3 and 4 of the Argument of the Case, *infra*, these facts are insufficient as a basis for estoppel against Hunt.

Specification No. 3—Findings on performance and breach.

Findings VI and VII (Trans. pp. 39-40) find that Hunt breached the contract by terminating the arrangement and that Phillips had performed fully up to that time.

There is a total omission to find on either Phillips' inability to pay or on his repeated violations of every credit arrangement made with him during the period. The trial judge himself said (Trans. pp. 193-194) "that there was a failure (of appellees) to pay and money owing is apparently not in dispute." The evidence showing the default of Phillips is summarized in Part I of the appendix to this brief.

Specification No. 4—Findings relating to the nature and origin of damages.

Finding VIII is to the effect that as a result of selling without "substantial" gross profit, Phillips incurred substantial losses, in that his business credit was damaged and he was unable to renew his bidding business.

Damage to credit:

The striking fact of this whole case is that Phillips *never had the financial ability to perform!* The only capital Phillips had at time of termination was accounts receivable (Trans. p. 144). There is no evidence as to what capital, if any, the partnership had at the start of this operation. Mr. Church told Phillips he would be out of business if he did more than \$5000 a month gross sales (Trans. p. 490) because of insufficient capital.

Causation:

There is no evidence that the *Hunt account* caused any loss of capital or credit. Other factors caused Phillips' condition, whatever the condition was. Thus, in February of 1953 a fire adversely affected Phillips' business and this affected the profits in his business (Trans. p. 233); an unauthorized withdrawal of \$5000 by the partner, Liholm, left the partnership short of capital (Exhibits I, J, M); Phillips was also hampered by the bankruptcy of a larger creditor who owed him \$4000 (Exhibits AK, AF).

In addition to these factors, in 1952, when arrearages on the Hunt purchases were mounting, Phillips paid out over \$12,000 as a loan to the limited partner, Overseas Finance & Trading Co. (Trans. p. 237), at the rate of about \$1000 a month (Trans. p. 389) the limited partner being then in tax trouble with the Federal government and paying off Federal tax liens. The loan was not repaid. *These* events caused whatever loss may have been suffered.

There is no proof of what loss Phillips suffered in the Hunt business—in fact appellee's counsel stated no effort would be made to prove the amount of any loss so suffered (Trans. p. 130). According to Mr. Willey, appellee's accountant, the Overseas Finance & Trading Co. (which Phillips asserted (Trans. p. 146) was his only source of credit), was unable to advance any funds to appellees because all its capital was tied up in a camera business (Trans. pp. 390-391), and, also, that company was struggling to pay off Federal tax liens on the installment plan (Trans. pp.

392-393). Obviously, this drying up of an alleged credit source was not caused by Hunt. It was due to the Overseas Company's business problems, with which Hunt was not concerned.

There is no evidence that Phillips requested credit from his limited partner or from a lending institution, *before or after* termination; hence no evidence of lack of credit.

Resumption of bidding business:

The evidence shows, (see summary under Specification 2 above), that Phillips did a tremendous bidding business while handling the Hunt arrangement. Phillips himself testified that immediately upon termination "we started to resume our bidding business and we also went into the brokerage business". (Trans. p. 144). He admitted that volume increased a few weeks after termination (Trans. p. 234), and between June 1953 and September 1954 he wrote often of the substantial volume he was doing after termination (Exhibits J, K, P, R, S, T, U, Y, AI, AK, AL). He even sent copies of large new contracts (Ex. R) and a summary of new accounts receivable (Ex. U).

Specification No. 5—Findings relative to Hunt's knowledge of the agreement.

Finding IX is to the effect that Hunt was informed of and consented to the Phillips' plan to sell at little profit for two years and discontinue his bidding business. As will be shown in the discussion of the "Equal Dignities" law, [Part 6 of the Argument], it was

incumbent upon Phillips to prove that an executive officer of Hunts actually had notice of the terms of the contract found by the Court to have been made.

The whole arrangement was made between Phillips and Flynn (Trans. p. 170), who was not an executive officer. Phillips had a conversation with Miller, the assistant sales manager, but details were not discussed (Trans. p. 107), and Miller, (who was not an executive officer), knew nothing of the details (Trans. pp. 445, 446). Flynn made no reports to superiors of what he arranged with Phillips (Trans. pp. 421, 424, 445-446).

The *only* time Phillips ever talked with an executive officer was *after* termination when he telephoned Mr. Erlanger, who had never heard of a contract with Phillips (Trans. p. 141).

Specification No. 6—Findings relating to basis for computing damages.

Finding X (Trans. p. 41) finds that a “reasonable computation” of damages is \$21,500.

There is no foundation for any award of damages. Appellees’ counsel has stated that the damages sought are based on a prospective profit (Trans. p. 120). In Part II of the Appendix we discuss in detail the insufficiency of the evidence to support any finding of damages. Suffice it to point out here that Phillips was authorized to resell to 21 commissaries (Exhibit AM), and he operated for 16 months, yet he proved only the amount of his sales at Alameda Air Base for

12 months (Trans. p. 295), four months at Fort Ord (Trans. p. 298), and four months at Hamilton Air Base (Trans. p. 300). These limited periods were selected because sales were “spotty” in other months (Trans. p. 300). Using these carefully selected figures, and making the additional but unwarranted assumption that (Trans. pp. 312-314) the same products would be sold at each commissary, Phillips then *estimates* his annual volume at the three bases, disdaining proof of the *actual* annual volume. He then assumes that others of the commissaries were “as big” as these (Trans. p. 314), and thus derives an estimated annual volume at other bases, again failing to prove his *actual* annual volume. He then invents a margin for the future of 20% gross profit (Trans. p. 317) without any foundation therefor.

Even with this pyramid of speculations, Phillips never produced evidence of his expenses of doing business as against his gross profit guess.

In order to make a proper finding on damages, the *Court would have to find*:

(a) that Phillips was entitled to unlimited credit to enable him to make the prospective sales on which loss of future profits is based;

(b) the amount of the prospective volume;

(c) the percentage of *net* profit that could be made by Phillips (gross less expenses);

(d) the length of the period the arrangement was to run.

The Court didn't so find; it couldn't.

Specification No. 7—The Court incorrectly applied the law.

Discussion of the law applicable to this case is found in the next succeeding section of this brief.

III.

CONCISE ARGUMENT OF THE CASE.

1. THE REASON FOR TERMINATION NEED NOT BE STATED TO THE OTHER PARTY.

The default of Phillips in his payments, his callous disregard of every payment plan, was a material breach, justifying termination. The trial judge made much of the fact that the default was not mentioned in the conversation at which Phillips was advised of the termination (Trans. p. 526).

It is not necessary that the cause for termination be stated to the other party. It is only necessary that there *be* a cause. Justice Brandeis, for the United States Supreme Court, summarized the rule in *College Point Boat Corp. v. U. S.* (1925) 267 U.S. 12, 45 Su. Ct. 199, 69 L. Ed. 490 (at page 493 of 69 L. Ed.):

“A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for non-performance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at

the time, an adequate cause, although it did not become known to him until later.”

See also:

Restatement, Contracts, Sec. 278;

Western Auto Supply v. Sullivan (C.C. 8, 1954)
210 F. (2d) 36.

That there was sufficient cause is demonstrated in the review of the evidence in Part I of the appendix.

2. THE ARRANGEMENT WAS TERMINABLE AT WILL.

There are many gambles taken in commercial life. Here Phillips bought Hunt's products and resold them. Each *hoped* the arrangement would be mutually successful and would continue. This is true of *any* business arrangement. The trial Court felt that if parties *hope* that an arrangement will last for a period of time, they *thereby agree* to deal for a period of time (Trans. pp. 243-244). But the law is clear that a hope is not itself an agreement binding parties for a period of time; each is, nevertheless, free to stop dealing with the other. A mutual expectation of indefinite continuance of a relationship is customary but that does not abridge the right of either party to terminate. *Curtiss Candy v. Silberman*, (C.C. 6th, 1933) 45 F. (2d) 451 at 452. (See also *Ruinello v. Murray* (1951) 36 Cal. (2d) 687, 227 Pac. (2d) 251).

Contrary to the view expressed by the trial Court (Trans. p. 529) the mere fact that the parties did busi-

ness together for more than a year does not raise any inference that they had actually contracted to be bound to each other for that or any other period. A persuasive line of cases supports this contention: *Willard Southland & Co. v. United States* (1922) 262 U.S. 489, 67 L. Ed. 1086; *Curtiss Candy Co. v. Silberman* (6th Circuit) 45 F. (2d) 451; *Jordan v. Buick Motor Co.* (7th Circuit) 75 F. (2d) 447; *William C. Atwater & Co. v. United States* (1922) 262 U.S. 495, 67 L. Ed. 1089; *Fitzgerald v. First National Bank* (8th Cir., 1902) 114 Fed. 474 and others. All of these cases concern manufacturer and dealership agreements, some written and some oral, and they hold that the arrangement is terminable at will.

The Fourth Circuit summarized the rationale of the decisions in *Ford Motor Co. v. Kirkmyer Motor Co.* (1933) 65 F. (2d) 1001 at 1003:

“This contract was not one of sale, or of hiring, or of agency. Viewed in the light most favorable to plaintiff, it was nothing more than a conditional contract to sell goods to plaintiff in the future upon the terms and prices at which sales were made to other dealers, but without specifying the amount of goods to be sold or purchased.”

“It merely furnishes a basis upon which dealings are to be conducted; and, while it is a binding contract to the extent that it is performed, it imposes no obligation on defendant to sell or on the dealer to buy and furnishes no basis for recovery of damages if defendant refuses to sell.”

3. LACK OF MUTUALITY MAKES THE CONTRACT TERMINABLE AT WILL.

The mutuality and enforceability of a contract depends upon whether or not both parties are bound by the agreement and whether there is sufficient certainty as to quantity so that it is feasible to ascertain the amount of the commodity intended as the subject of the arrangement.

In this case, the lack of mutuality is demonstrated principally, but not exclusively, by two separate facts: *First*, Phillips was entitled to and did freely engage in his brokerage as well as his bidding business; *second*, Hunt couldn't force Phillips to buy as much as one can of goods.

(a) Phillips right to concentrate on other business.

Hoffman v. Pfingsten (Wis. 1951), 50 N.W. (2d) 369, 260 Wis. 160, 26 A.L.R. (2d) 1132, is startlingly similar to this case. The plaintiff was the exclusive distributor of the defendant's products. The original contract obliged plaintiff to take 25,000 bottles of defendant's shoe dressing monthly, but this was modified and that requirement was completely eliminated (Phillips had no quota to meet). It was held that the contract as modified lacked mutuality. The Court pointed out that this is *particularly so* where a plaintiff has no obligation to give all his time to the defendant's products, but is permitted by the contract to engage in other business (as Phillips was, and did). *Friedman v. McKay Leather Co.* (1919) 179 Cal. 566, 178 Pac. 139, at page 568 of the official report:

“As the appellants did not agree to give all or any definite portion of their time to respondent’s business, it was wholly optional with them whether or not they would endeavor to secure orders for respondent.

(b) **Phillips could not be forced to buy from Hunt.**

The Eighth Circuit in *E. I. Du Pont De Nemours & Co. v. Claiborne* (1933) 64 F. (2d) 224, had before it a case very similar to the instant case (except that in that case, unlike this one, the dealer had spent six years building up the market for the products and had invested large sums in the business). The issue as stated by the Court (page 227) :

“Reduced to its lowest terms, the claim of the Reno Company is that what it bargained for and received from the Du Pont Company was an agreement that it should be the sole distributor of Duco in the State of Iowa so long as the Du Pont Company was satisfied with its services and so long as it (the Reno Company) chose to perform the services; that the consideration for the promise on the part of the Du Pont Company was the promise of the Reno Company to act as sole distributor and to do the things which it was required to do under the agreement, and the performance of that promise.”

(This is virtually a summary of Finding I, Trans. p. 38.)

The Court held that the defendant could terminate such an exclusive contract at any time for lack of mutuality:

.

“The contract itself provides that the consideration for the services of the Reno Company is the discount of 25 per cent, upon all materials ordered from the Du Pont Company. The agreement was nothing more than a sales agency agreement, terminable at will by the Reno Company, but containing a promise of the Du Pont Company to continue so long as satisfied with the services of its distributor.” (Pages 228, 229).

“Our conclusion, therefore, is that, whether the termination by the Du Pont Company was in good faith or bad faith, no action for damages could be based upon it.” (P. 233).

See also: *Velie Motor Co. v. Kopmeier* (C.C. 7th, 1912), 194 F. 324; *Oakland Motor Co. v. Indiana Auto. Co.* (C.C. 7th, 1912), 201 F. 499; *Woerhide v. Barber Asp. Pav. Co.* (C.C. 8th, 1918), 251 F. 196; *Huffman v. Paige-Detroit Motor Co.* (C.C. 8th, 1919), 262 F. 116.

(c) An agreement to “promote the sales” is not sufficient consideration for a promise to keep Phillips as a jobber for an unspecified period of time.

In *Leach v. Kentucky Coal Company* (1919), 256 Fed. 686, the plaintiff was to sell and distribute “as much as possible” of defendant’s products for five years in a particular territory. The Court held that there was a lack of mutuality:

“There is no obligation whatever upon plaintiff to order any coal. If plaintiff had refused or neglected to order coal, defendant would not have any cause of action against him.”

Similarly: *Jackson v. Alpha Cement Co.* (1907), 106 NYS 1052.

The last two cases mentioned were followed by the California Court in *Scott v. Cline Electric Manufacturing Company* (1930), 104 Cal. App. 122 at 126; 785 Pac. 349 at 351.

Accord: *Hancock Oil Co. v. McClellon* (1955), 135 Cal. App. (2d) 667; 288 Pac. (2d) 39; *Lawrence Block Co. v. Polston* (1954), 123 Cal. App. (2d) 300 at 308; 266 Pac. (2d) 856; *J. A. Folger Co. v. Williamson* (1954), 129 Cal. App. (2d) 184 at 187; 276 Pac. (2d) 645.

(d) Phillips engaging in a new business.

A recent annotation in 26 *ALR* (2d) 1139 at 1141 points out that in determining whether the approximate quantity involved is sufficiently ascertainable, the Courts hold that if the business is a *new type of business* when the contract is made, the contract is uncertain and unenforceable because there is no criterion to determine the amount that would be needed. Here *Phillips admits* that the jobber arrangement was new to appellees and drastically different from his prior business (Trans. p. 168 and see p. 97).

(e) Part performance does not supply mutuality.

The trial Court on many occasions showed it was impressed by Phillips' testimony that he had doubled sales of Hunt's products to commissaries. This does not affect the mutuality question. In *A. Santaella & Co. v. Lange Co.* (C.C. 8th), 155 F. 719 at 725, in-

volving an exclusive sales representative in a designated territory, the Court said that counsel had been

“placing much stress upon the contention that the testimony of Mr. Lange tended to show that a part of his undertaking under the arrangement between the parties was that he should, by his experience and labor, extend the field for the sale of the cigars to be furnished by the plaintiff in error, thereby creating a larger market for them, and that he performed in this respect his undertaking. *Let it be so conceded. But how does this obviate the stubborn fact that whether or not he would maintain that field and demand, occupy or abandon it, or cease, ad libitum, to send in any orders, or betake himself to some other field of operation and employment, where wholly optional on the part of the defendant in error?* The plaintiff in error, on such election by its purchaser, was without remedy.” (Emphasis added)

Accord. *Victor Talking Machine v. Lacher* (Minn. 1915), 150 N.W. 790.

(f) **Exclusive dealership does not cure lack of mutuality.**

Phillips was not an “exclusive” dealer to the extent of being prevented from engaging in other business.

Phillips would distinguish the cases on the ground that he had an “exclusive” (Trans. p. 199). Many of the cases above cited involved “exclusives”. As was said in *Curtiss Candy Co. v. Silberman* (C.C. 6th, 1930), 45 Fed. (2d) 451 at page 453:

“On the other hand, the normal inference is that the parties intended the restrictive promise of defendant, to sell to no others in Hamilton

county, to be operative only for that period during which plaintiffs continued to represent defendant; in other words, that the grant of exclusive territory was dependent upon and related to the performance of the marketing agreement and was coextensive in term with it—*that it was, as was the marketing agreement, revocable or terminable at will.*” (Emphasis added)

An exclusive representative contract, even where the product is new and requires the representative to install expensive show rooms or warehouses and do much advertising (which Phillips was *not* required to do), is terminable at will where one or both parties has an unrestricted right to refuse to perform (*Royal v. Chicago Streamlite Co.* (7th Circuit 1950), 178 F. (2d) 81).

4. THE STATUTE OF FRAUDS IS A DEFENSE AND ESTOPPEL IS NOT APPLICABLE.

Appellant pleaded the Statute of Frauds (Trans. p. 24), and also moved, unsuccessfully, for dismissal prior to trial on the same ground (Trans. pp. 33-35). The California Civil Code, Section 1624(1) requires that a contract which is to last for more than a year shall be in writing. The trial Court held that the oral contract was to continue for more than one year but that appellant is estopped to rely on the Statute.

The doctrine of estoppel never operates to destroy the salutary rules embodied in the Statute of Frauds (*Stepp v. Williams*, 52 Cal. App. 237, 198 Pac. 661). The Statute is designed to protect a defendant in a

situation like the instant one wherein the plaintiff's claim is based on a conversation with a dead man.

Estoppel is not favored by the law (23 *Cal. Jur.* (2d) p. 421); it is applied only where the plaintiff suffers an "unconscionable hardship" in performing, which defendant caused by action or inaction. "Unconscionable" means monstrously harsh and shocking to the conscience (Cf. *Domas Realty Co. v. 3440 Realty Co.* (1943), 40 N.Y.S. (2d) 69 at 73, 179 Misc. 749).

In order to warrant the application of the doctrine two basic elements must be found—(a) Acts or representations of the other party which are tantamount to fraud, (b) causing unconscionable hardship.

The trial Court's finding as to the representation element is two-fold: that Phillips said he intended (1) to sell at small profit for a while, and (2) to curtail his other business so that he could work the Hunt account. On the hardship element, it was found that Phillips did so operate with the result that, at time of termination, his credit was impaired and he was unable to resume his bidding business.

The representation element:

It is important to note that Phillips was *not required by the agreement* to follow through on either of his "intentions". Under the contract, as pleaded and found by the Court, Phillips was entitled to fix his own sales price and he was entitled to and did devote all the time he wished in his business for other customers. Therefore, assuming for the moment that there was a detrimental change of position, never-

theless it would not be sufficient to raise an estoppel because the change of position was not required by the contract or implicit in the performance. (23 *Cal. Jur.* (2d) p. 423; *Schick Service v. Jones* (C.C. 9th, 1949), 173 Fed. (2d) 969.

The evidence bearing on the two representations is discussed under the second specification of error above. The import of the first part of the finding is that appellees made *some* but *might have made more* profit. Estoppel is never intended to work a gain to a party (*Palmer v. Phillips* (1954), 123 Cal. App. (2d) 291, 266 Pac. (2d) 850). The loss of a chance for greater profits is never a ground for estoppel, otherwise estoppel would be "an instrument of gain or profit while its object is protective and limited to saving harmless or making whole the person in whose favor it arises" (*Little v. Union Oil Co.* (1925), 73 Cal. App. 612, at 620-621, 283 Pac. 1066 at 1069).

In *Morrison v. Land* (1951), 169 Cal. 580, 147 Pac. 259, it was held that plaintiffs' refusal of other offers of employment at higher compensation (relying on defendant's promise) was not sufficient to raise an estoppel.

There are numerous California cases in which a plaintiff, suing on an oral contract, unsuccessfully relied on estoppel based on loss of anticipated benefits. See cases summarized in *Palmer v. Phillips* (1954), 123 Cal. App. (2d) 291, 266 Pac. (2d) 850.

The intention of Phillips to abandon his bidding business is no basis for estoppel because, as shown above, he *didn't* abandon that business; rather, it con-

stituted 75% of his business, his Hunt account being a relatively minor item.

On the Hardship Question:

As seen in the discussion of facts relative to Phillips' credit situation, under the 4th Specification of error, if there was any credit impairment, there is no evidence that this was *caused* by the Hunt sales, but on the contrary the numerous other adversities were the proximate cause.

The fact that Phillips didn't pay Hunt on time does not by itself establish lack of credit nor that he was unable to pay. It only shows that he did not pay—it doesn't show *why* he didn't pay.

The parties didn't contemplate possible impairment of credit, therefore if such resulted, it is not a ground for estoppel (*Little v. Union Oil Co.* (1925), 73 Cal. App. 612 at 620, next to last paragraph; 238 Pac. 1066 at 1069).

5. ANY TERM, INDEFINITE OR NOT, WHICH IS FOR MORE THAN A YEAR IS WITHIN THE STATUTE.

The trial judge stated that because the parties did business for 16 months, they had contracted for an indefinite but longer period than that (Trans. p. 529).

But if the contract was for an indefinite period and such period exceeds a year, then by definition the agreement is barred by the Statute of Frauds. *The Ninth Circuit has so held.*

In *Fibreboard Products v. Townsend* (C.C.A. 9th, 1953), 202 Fed. (2d) 180, the plaintiff quit a job, sold

his household goods at a sacrifice and moved to California with his family upon defendant's promise of permanent employment. District Judge Harrison held that the defendant was estopped to assert the Statute of Frauds and also held that the particular contract for permanent employment should continue for two years but was not within the Statute. *Circuit Judges Pope and Healy agreed that estoppel was there present but held that a contract for a reasonable time is within the Statute if the reasonable time is more than one year:*

“I have difficulty in reasoning how this can be in fact a contract for employment for a period of two years and yet not come within the provisions of the California Statute of Frauds relating to contracts not to be performed within a year.” (Page 183.)

“that since the contract from Fibreboard to Townsend was in truth and in fact a contract for employment for two years, the impact of the Statute of Frauds upon it would be precisely the same as upon any other contract for employment for a fixed period in excess of one year.” (Page 184.)

No matter what theorizing is done, if the end result is a contract that was to last for more than a year, it is within the Statute of Frauds.

The contract is made by the parties when they contract—a new contract cannot be made by a sympathetic Court after termination. In the *Du Pont v. Claiborne* case, from which we have quoted at length above, the Eighth Circuit said:

“We have much sympathy with the theory upon which the case was disposed of in the court below. It seems fair that, after having spent six years in developing the territory assigned to it, the Reno Company should have been permitted to continue or should have been compensated for the injury done it by having its business taken away. However, the injury done to the Reno Company was one against which its contract, rather obviously, did not afford protection.” (Page 233.)

6. NO ONE HAD AUTHORITY TO BIND HUNT FOR MORE THAN ONE YEAR.

California Civil Code Section 2309 requires that the authority of Mr. Flynn, the Hayward sales manager, to make such a contract as that found by the District Court must be evidenced by a writing. Since the contract, as found, was to last for more than a year, it must be in writing (C.C. 1624(1)) and the authority of the Hunt employee to enter into such a contract must also be in writing under Section 2309 of the same Code unless the employee is an executive officer. This rule is generally known as the “Equal Dignities” Rule.

There is no evidence that Hunt’s employee, Flynn (or Miller) had any written authority to enter into a contract which would continue for more than one year. (See summary of evidence under Specification No. 5 above.) Neither Flynn nor Miller were executive officers. A jobber arrangement was unique with Hunt (Trans. p. 446).

Both the Ninth Circuit and the California Court have rendered decisions which control on this point.

The Ninth Circuit decision is *Ekwood Lumber Co. v. Moore Well & Lumber Co.* (1938), 97 Fed. (2d) 402. This was a suit for damages for breach of alleged contract for sale of substantial amounts of lumber, which contract was required by the Statute of Frauds to be in writing. The alleged contract was a letter written by one who was the sales agent of the defendant corporation in obtaining orders for lumber in a specified area (like Flynn and Miller of Hunt Foods). The Court held that, the defense of the Statute of Frauds having been raised, the burden was on plaintiff to prove written authority of the agent to enter into the contract and that plaintiff had failed in his proof. The Court said, referring to the defendant as appellee, (page 409):

“Assuming, . . . that it was represented that the authority of Carl R. Moore . . . included the making of contracts of sale, there is no evidence that such representations went to the extent of allowing for an assumption that the agent had authority to enter into contracts required to be in writing. . . . *Appellee could in no way be estopped to assert the defense of California Civil Code, sec. 2309, unless it represented that its agent was authorized to enter into contracts required to be in writing.*” (Emphasis added.)

Followed in *Jeppi v. Brockman Holding Co.* (1949), 34 Cal. (2d) 11 at 17; 206 Pac. (2d) 847.

In *Anderson v. Standard Lumber Co.* (1923), 64 Cal. App. 410, 1 Pac. 495, the defendant corporation's

agent was authorized to hire designated types of employees at specified wages. The agent exceeded his actual authority by hiring the plaintiff (who was not within the authorized categories of employees) and by agreeing to pay plaintiff a salary in excess of that authorized. The plaintiff was later discharged and sued to recover the salary stated in his contract made with the agent of the corporation. The Court held that plaintiff could not hold the corporation to the alleged contract since it was made by the agent without authority; that *the corporation officers had no knowledge of the alleged terms of the contract, even though they did know that the plaintiff had been employed*, and the corporate officers had made no representations to the plaintiff that the agent had any such authority.

Cited in:

Mortgage Guarantee Co. v. Chotiner (1936), 8 Cal (2d) 110 at 113; 64 P. (2d) 138 at 140.

The California Supreme Court has ruled that where a plaintiff claims that a ten year contract was made by an agent (exactly as Phillips did here) the contract must be in writing and the written authority of the agent must be proved.

“It is claimed by the appellants that the record contains no evidence showing any authority on the part of either Charles L. Fair or Hermann Oelrichs to bind Mrs. Oelrichs and Mrs. Vanderbilt by any such contract as found by the Court. We think this contention is sound and must be sustained.”

(*Seymour v. Oelrichs* (1909) 156 Cal. 782 at 788.)

The case just cited also held that knowledge by a principal of a contract with the plaintiff does not justify any inference of ratification of or notice of a contract required to be in writing. Thus, if we assume the officers of Hunt Foods knew Phillips was buying and selling their products to commissaries, exclusively or otherwise, *there is no inference of notice of or of ratification of any agreement which wasn't terminable at will.*

“Even though they (the principals) had knowledge that he had made a contract of employment with Seymour on their behalf, their duty to inquire into the terms of such contract did not impute to them notice that he had exceeded his authority and undertaken to bind them by an agreement required to be in writing.” (P. 791 of official reports; p. 92 Pac. reports.)

It is the rule in California that in order to rely upon any ostensible authority, the plaintiff must produce evidence of similar transactions in which the act of the agent was authorized or recognized; he must show at least one specific instance in which a similar act of the agent was authorized or recognized, 2 Cal. Jur. (2d) p. 700, citing cases (*Dunlap v. Dean* (1930) 109 Cal. App. 300 at 307, 292 Pac. 991 at 994). It is admitted that the particular arrangement claimed by Phillips was “unique” for Hunt Foods (Trans. p. 446), so no prior *custom* existed.

Here the most that can be said is that the corporate officers knew that Hunt products were being sold to Phillips. There is no proof of knowledge by an of-

ficer of Hunt of any arrangement that was to endure or could be required to endure for *any* period of time. Phillips has not met his burden of proof.

7. PROSPECTIVE DAMAGES NOT AWARDED TO A NEW ENTERPRISE.

Phillips testified that this was a new type of business for the partnership; that this was "a drastic change for us from one kind of business to another" (Trans. p. 168); even the items sold were different (Trans. p. 97). In fact the business was so new he had not even started to sell at some of the commissaries and at others he was just getting some items in at time of termination (Trans. pp. 127-128). Even the partnership itself was new, having merely one year's operation in the other type of business (Trans. p. 171).

It is well established that no prospective profits may be recovered when the alleged breach occurs in connection with a new venture which is interpreted by the defendant. 25 *C.J.S.* 519.

California Press Mfg. Co. v. Stafford Packing Co. (1923) 192 Cal. 479, 221 Pac. 345. The trial Court awarded damages for loss of prospective profits but the Supreme Court reversed, saying (p. 485):

"Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation."

See also:

Gibson v. Hercules Mfg. & Sales Co. (1927) 80 Cal. App. 689, 252 Pac. 780;

Hartley v. Weller (1951) 104 Cal. App. (2d) 118, 231 Pac. (2d) 133.

8. THERE IS NO EVIDENCE TO SUPPORT A DAMAGE AWARD TO PHILLIPS.

The findings do not indicate how the Court arrived at \$21,500 as the amount of prospective damages suffered by appellee.

(a) The best possible proof must be given.

Because any estimate of future profits is speculative, it is necessary that the best available proof be adduced (*Allen v. Gardner* (1954) 126 Cal. App. (2d) 335 at 342, 272 Pac. (2d) 99) (See *Sedgwick, Damages*, 9th Ed., Sec. 171). Usually the proof consists of showing the actual receipts and expenses during the period of operation and, where possible, the sales made in the plaintiff's territory after the termination (*Restatement Contracts*, Sec. 331, comments c and e). Appellee did *neither*, although both figures were available. There is no evidence of the sales and expenses while handling the Hunt account. The summary of the evidence is set forth in Part II of the appendix.

(b) Guesses and conjectures are not sufficient.

The comment on the evidence in Part II of the appendix shows that Phillips substituted speculation

as to the annual volume done by him at three of the 21 bases, rather than proving the actual volume, then estimates his volume at the other commissaries, invents a margin of gross profit for the year after termination, followed by an imaginary rate of increase.

Prospective damages must be proved just as any other damages are proved and that burden is on the plaintiffs; *Austin v. Roberts* (1933) 130 Cal. App. 328 at 333, 20 P. (2d) 97 at 99.

This bit of prophetic vision—or myopia—is not evidence on which an award for damages may be given (*Caspary v. Moore* (1937) 21 Cal. App. (2d) 694 at 699, 70 Pac. (2d) 224).

In *Stephany v. Hunt Brothers* (1923) 62 Cal. App. 638 at 643, the plaintiff was an exclusive sales agent who sued for damages for the premature termination of his contract. By a system of multiplication based on estimates of what sales he could have made, he endeavored to show the probable volume of business that might have been secured but for defendant's breach. The Court held that this type of evidence was *not a basis for an award of prospective damages*. See also: *Friedman v. McKay Leather Goods* (1919) 179 Cal. 566, 178 Pac. 139; *Baumer v. Franklin Co. Distilling Co.* (C.C. 6th, 1943) 135 Fed. (2d) 384; *Parke v. Frank* (1888) 75 Cal. 364, 17 Pac. 427.

Schmitt v. Continental-Diamond Fibre Co. (C.C. 7th, 1940) 116 Fed. (2d) 779, is strikingly similar. The plaintiff there, also an exclusive sales agent, unsuccessfully introduced the same type of evidence as that

relied upon by Phillips in the case at bar. The Circuit Court summarizes the theory of that plaintiff, referring to him as appellant (page 784):

“Appellant, of course, admits that he lost money on his contract during the year 1931, and the first five months of 1932, until its termination. Nevertheless, he contends that it was still a valuable contract to him for the reason that he was then in a position to reduce his expenses substantially and still keep up his volume of sales—that up until that time he had been spending a great deal in building up his territory . . .”

“Appellant assumes that a certain percentage of this business would have originated in his district, the percentage increasing from 28% in 1932 to 31% in 1934 and 1935—a wholly arbitrary figure so far as we are able to ascertain. Such percentage of business would have yielded him certain gross commissions, from the amount of which he subtracts expenses not exceeding \$35,000 a year, leaving a total of \$163,095 for the years 1932 to 1935, inclusive.”

“The District Court was justified in disregarding such testimony as proof of appellant’s damages, and, in the absence of any better evidence, in holding that appellant had not proved his claim for damages, conceding for the moment that he had proved breach of the contract.”

(c) Contingent future bargains rendered damages uncertain.

Where future profits are dependent on collateral agreements, or contingent on future bargains or states of the market, they are too uncertain.

The evidence, summarized in Part II of the Appendix hereto, shows that the conditions in the commissaries are not constant; that there are frequent changes in volume at the individual commissaries; that a profit is dependent on the particular "condition" you are in at a particular commissary; that purchases are at the discretion of individual officers, that Phillips' estimates of future sales was based on what some officer hoped to order (but hadn't) in the future.

Such uncertainty precludes a damage award (*Sedgwick, 9th, Damages*, p. 9378, Sec. 197; *McGregor v. Wright* (1931) 117 Cal. App. 186 at 197—leadnote 6, 3 Pac. (2d) 624). See also 15 *Amer. Jur.* p. 557.

(d) Phillips' dilemma.

Appellee's case is based on what profits Phillips thinks he might have made after termination. Yet, when arguing for an estoppel against the statute of frauds, Phillips asserts the Hunt business was handled at a loss. If he did operate at a loss, then an estimate as to profits he might have made has no probative force. *Lewis-Hale Co. v. Enterprise Fuel Co.* (4th Cir. 1929) 33 Fed. (2d) 727 at 730:

"Bearing in mind that during most of the time the Washington office had been conducted at a substantial loss, and at no time at a profit, we do not attribute probative force to the opinion of the agent's Washington manager as to the sales which would have been made had the agency continued."

(e) **Fatal lack of proof of Phillips' expense of doing business.**

There is not a scintilla of evidence—not even a guess—as to what Phillips' travel expense, sales expense, billing or overhead amounted to at any time. His collection of guesses are all as to *gross* profit, but *he failed completely to introduce any evidence of his expense of doing business.*

Skuper v. Imperial Irrig. Dist. (1939) 33 Cal. App. (2d) 392, 91 Pac. (2d) 910, the plaintiff proved his income before and after the event but did not offer evidence of his *expense* of doing business. The Court held that this failure of proof on the part of plaintiff prevented any award for lost profits.

15 *Amer. Juris.*, page 574:

“Proof of the gross receipts of the business standing alone, however, is not sufficient.”

Similarly:

Ellerson v. Grove (C.C. 4th, 1930) 44 Fed. (2d) 493 at 499;

Fireside Marshmallow Co. v. Quinlan (C.C. 8th, 1954) 213 F. (2d) 16.

In *Central Coal & Coke Co. v. Hartman* (C.C. 8th), 111 Fed. 96, the plaintiff testified to his ordinary profit on the merchandise based on his purchase cost and his sale price. The Circuit Court held this was *not* enough—the expense of operating is an essential part of the proof.

Alexanders Dept. Stores, Inc. v. Ohrbach, Inc. (1945), 56 N.Y.S. (2d) 173 at 182, 269 A.D. 321. Plaintiff, a general department store, sued defendant

manufacturer for refusing to sell it a brand name line of clothes. The plaintiff proved (1) the actual volume of sales for two years before he was cut off and one year afterward (2) the increase in volume in the second year over the first year and the further increase in the third year (3) the cost price, the sale price and the mark-up. An accountant who had done plaintiff's work for many years estimated the costs, overhead expenses and profits in the particular department in this store, and computed the per cent these items were of the selling price. Held: For the defendant.

“With nothing before the court to indicate even approximately what the deductible expenses were or how they were calculated and no standard of comparison between the net profits earned before the discrimination and those earned during the period, the proof is insufficient to sustain the damages found.”

(f) No proof of profits or losses after termination was introduced.

A plaintiff must not only prove what his expenses were and what expenses in the future are anticipated, but he must show what profits he made in his other business since termination (1953, 1954 and 1955), earnings which the time and facilities of his office, left free by the absence of Hunt account, enabled him to make from other clients. (*Palmer v. N. Y. Herald* (1929), 239 N.Y.S. 619; *Rapidol v. Howe* (Wash. 1927), 258 Pac. 469).

(g) No proof of ability to perform.

The evidence set forth in Part I of the appendix shows that at time of termination Phillips' only capital was accounts receivable (Trans. p. 144) which he had previously assigned to Hunt (Ex. E) and he owed Hunt some \$25,000 (Trans. p. 218) which was long overdue (p. 9 of Ex. AP).

There is no evidence that Hunt ever agreed to finance appellee's business, nor that Church or any one else would have authority to agree to finance the business. Hunt Foods, Inc. is not in the banking business.

Even if we assume, without basis therefor, that Hunt voluntarily did finance plaintiff up to time of termination, that would not constitute an agreement to extend any credit for the future.

Proof of the ability of the appellee partnership to pay for and receive the Hunt merchandise was essential in order to establish that damages resulted from any supposed breach. (*Watson v. Oregon Moline Plow Co.* (Ore. 1924), 227 Pac. 278 at 285), 112 Ore. 414.

A party to a contract cannot insist upon damages for nonperformance by the other unless he proves his ability to perform thereafter (12 *Am. Jur.* 889).

The California rule is succinctly stated in:

McDorman v. Moody (1942), 50 Cal. App. (2d) 136 at 141, 122 Pac. (2d) 639 at 642.

"It is a general rule that one who cannot perform his part of a contract is not entitled to per-

formance on the part of his contractee. (17 C.J.S 934.) Notwithstanding that if a vendee under a sales agreement notifies the vendor before the latter is in default that the vendee will not perform, . . . *yet upon the trial there must be proof of the vendor's ability to perform all of his covenants.*" (Italics ours.)

It was clearly established that Phillips could not finance the jobber operation. He testified (Trans. p. 131) that as business increased the more he owed Hunt and that he never had funds with which to pay Hunt faster (p. 512). He could not have continued after termination unless Hunt became a banker for him and this Hunt was neither obligated nor disposed to do.

CONCLUSION.

Phillips was never obliged to purchase any Hunt products. He had no obligation to establish a warehouse or to advertise. He was entitled to, and did, devote as much time as he desired to his bidding and brokerage business. Since Hunt could not compel Phillips to do anything, there is a complete lack of mutuality.

If the oral contract was to endure for more than a year it is within the Statute of Frauds. The only grounds for estoppel against this plea, as found by the Court are that, at the time of contracting, Phillips said he *intended* to sell at a small profit for a year or so and that he *expected* he would have to abandon

his other business. He did *not oblige* himself to do either.

A small profit is nevertheless *a* profit, and loss of greater profits is not a ground for estoppel, otherwise the doctrine would be applied as “a sword instead of a shield.” Further, there is no evidence of what profit—large or small—Phillips actually made on his Hunt operation.

Phillips may have expected to abandon his other work but he did not do so—in fact his other business constituted 75% of his volume during the Hunt period.

The only finding of hardship is that Phillips’ credit was not good at the time of termination but there is no showing what credit he ever had, nor what caused his poor credit. His only alleged source of credit was his limited partner, and that partner was unable to help, *not because of Hunt*, but because of the limited partner’s own business practices and tax difficulties.

The evidence shows that no executive officer of Hunt knew of such a contract as that found by the Court, a contract which would be unique with Hunt. Knowledge that Phillips was buying from Hunt is not knowledge of the terms of an unusual contract.

Whether or not termination was justified is immaterial because of the lack of mutuality and the application of the Statute of Frauds. Nevertheless, there was ample justification for termination in the material breach by Phillips, his refusal to pay on time

and his lending to his limited partner monies that were long overdue to Hunt and which, under the assignment of Receivables, were Hunt funds held by Phillips as a constructive trustee. This latter defection is a cause for termination, even if it was not known to Hunt.

In endeavoring to show damage, Phillips failed to produce the best evidence available and relied on rank speculation. The burden of introducing all facts available applies to a plaintiff seeking prospective damages to the same extent as in an ordinary damage action.

Hunt is entitled to judgment for the \$11,495.16 principal due, plus interest from the maturity dates of the respective trade acceptances and reasonable attorneys fees.

Dated, San Francisco, California,
November 14, 1956.

CUSHING, CUSHING, DUNIWAY & GORRILL,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

PART I.

SUMMARY OF EVIDENCE ESTABLISHING THE DEFAULT OF APPELLEES JUSTIFYING TERMINATION.

The terms of payment were arranged just prior to December 1951 between Phillips and a Mr. Church, of the credit department of Hunt (Trans. p. 469). At this time Phillips submitted a year-old statement of the partnership covering a three-month period (Trans. p. 179). Mr. Church testified that Phillips was to pay 10 days after delivery of merchandise (Trans. p. 470). Phillips testified that all invoices were marked "payable in 10 days" (Trans. p. 178). Mr. Church explained that in the canning industry the words "net 10 days" on an invoice means the buyer can take a discount if he pays within 10 days but that the invoice is delinquent after the 10th day; that this stemmed from the earlier practice in the canning industry of doing business on sight draft allowing 10 days in which to pay the draft and earn a discount (Trans. p. 488). Exhibit AP which is a correlation of invoices and dates of payment thereof, shows that shortly after he started selling Hunt products he failed to pay when due and thereafter was regularly delinquent. Phillips asked for an additional week over the 10 days (Ex. A), but Mr. Church insisted on payment within 10 days (Ex. C) and complained that Phillips had failed to fulfill his promise to submit current financial information in substitution for the year-old profit and loss statement which

covered only a three-month period (Exhibits B & C). There was no statement submitted until May of 1952 (Trans. p. 482).

The debt was mounting rapidly (Exhibit AN) and Phillips proposed (Ex. D) an assignment of Accounts Receivable, for the protection of Hunt (Trans. p. 188) which was executed May 12, 1952 (Ex. E).

This assignment (Ex. E), assigned to Hunt certain specified receivables and *all future* receivables.

“and *all* amounts which may become due and owing to Wellington Phillips & Co., a partnership, *in the future* arising out of the sale . . . to (specifying 17 commissaries)”.

Phillips says he never paid any attention to this assignment (Trans. p. 138). Phillips in his correspondence said the commissaries were paying him 3 to 4 weeks after he billed them (Exhibits F and G), and on his direct testimony he raised it to 5 weeks (Trans. p. 131), yet by August he was running behind as much as 3 months on payments to Hunt (pages 5 and 6 of Exhibit AP). His indebtedness mounted and remained large. It was around \$18,000 when the assignment was executed, over \$24,000 at the end of the year and a high of over \$29,000 in the middle of April, 1953.

At the time of termination appellees owed appellant \$28,813.19 and were then as much as five months overdue in payment for goods purchased from Hunt (Page 9 of Exhibit AP). For example, page 9 of this exhibit shows the payment on April 17, 1953, which

was the last payment he made before termination, included shipments to him on December 19, 1952 (4 months); his payment on March 24, 1953, included deliveries on October 16, 1952 (5 months); page 8 of this exhibit shows his payment on February 17, 1953, included items shipped on October 6, 1952 (4½ months). Yet Phillips testified (Trans. p. 131) that the payments from the government averaged 30 days from his billing date, which would be a week ahead of Hunt's invoices. Under the assignment these monies belonged to Hunt as received by Phillips. He was a trustee for Hunt and was, therefore, using Hunt's money to finance his personal needs and was withholding Hunt monies for approximately 4 to 5 months after he was paid.

In the face of these facts, there is no justification for Findings VI and VII.

PART II.

SUMMARY OF THE EVIDENCE RELATING TO PROSPECTIVE DAMAGES.

(a) ACTUAL VOLUME NOT SHOWN.

Appellees were permitted to resell to 21 commissaries (Exhibit AM). They operated for sixteen months.

Here is a short summary of a *few* of the available facts that appellee *failed* to prove:

- (1) The actual volume of sales and amounts of profit at the 21 commissaries.

- (2) The volume and the profit at Alameda Air Base in the four months after *December*, 1952 (he showed only the first 12 months).
- (3) The actual volume of sales at Fort Ord for the full 16 months. (Phillips put into evidence the sales for *only the last 4 months* he was to sell at that commissary.)
- (4) The actual volume at Hamilton for the full time. (He picked only the last four months because, in other months the sales were "spotty".)
- (5) The amount of his expenses of doing business (travel, billing, overhead).
- (6) Whether he lost or made profit in his quarter of a million sales of products of others or in his brokerage.

The following is an outline of the assumptions Phillips uses for "evidence" of sales done in connection with the subject of damages:

First assumption: He estimates the annual volume of sales at three of the 21 commissaries when he had available the actual figures. He took a selected 12 months at Alameda Air Base, 4 months at Ford Ord and four months at Hamilton Field, and endeavors to translate these into an annual volume. Thus, he takes sales for four "good" months at Fort Ord and multiplies this by three to get an estimate of what he did in a twelve-month period at that base. A guess is thereby submitted in lieu of the actual volume at

that commissary. He does the same for Hamilton Field Air Base. Phillips picked the particular four months at Ford Ord because that was the only period wherein sales were "consistent" (Trans. p. 300). He selected a different four months at Hamilton Field because the rest of the time the sales were "spotty" (Trans. p. 299). In this manner appellees derive an assumed annual volume at these three bases, ignoring the actual annual volume.

Second assumption: On the speculations as to what the annual volume might have been at the three particular commissaries, Phillips makes some further assumptions. They assume that Fort Ord's volume was seven times that of Alameda, without, of course, any evidence to support the estimate. Then he imagines that the Presidio, Mare Island, Mather Field and Castle Air Force Base are as "big" as Fort Ord (no evidence at all on this), and, therefore, were each sold seven times the volume to Alameda. Thus Phillips arrives at the estimated volume to those four bases without proving *any* actual sales to those commissaries (Tr. p. 314).

It is said that, to the philosopher, Herbert Spencer, a tragedy was a syllogism disproved by facts. In this case appellees' estimated volume of sales to the five commissaries, based on the pyramid of guess upon guess, is completely disposed by the facts. If the volume at the five commissaries, Ord, Presidio, Mare Island, Mather Field and Castle Air Force Base had *each* been seven times the \$11,000 volume at Ala-

meda Air Station, then the total volume in the 12 months of 1952 for these five bases *would have been* \$385,000 ($5 \times 7 \times \$11,000$). Yet Phillips' total volume of sales for *all 21* commissaries in 16 months was only \$94,000. This is "boot strap" argument and the straps are from seven league boots.

Compare, therefore:

<i>Actual</i> volume to 21 commissaries for 16 months	\$ 94,000
<i>Assumed</i> volume to 5 commissaries for 12 months	\$385,000

Furthermore, there was no evidence from which it could be inferred that conditions in the commissaries are relatively constant or that one is similar to another. In fact, Phillips' testimony shows that there are frequent changes in volume at the commissaries (e.g., at Ord where the number of items and volume of sales varied substantially from month to month). He admitted that making a profit at a commissary depends on the condition he is in at a particular base (pages 276-277), which, of course, can and does change from time to time. He never disclosed what condition he was in at the various commissaries. His testimony is to the effect that at three of the commissaries the particular purchasing officer, at time of termination, was "planning" to put in the Hunt line. These were Mather Air base (Trans. p. 127) Travis Field (Trans. p. 136) and at Treasure Island if certain other competitors could be eliminated (Trans. p. 147). Phillips also said that at Mare Island, the purchasing officer was an old navy friend

of his, and was planning to put the line in (Trans. p. 127) but up to the eve of termination Phillips had never sold at Mare Island (Trans. pp. 516 and 127), Hunt salesmen having done the job rather than Phillips. Whether a base would purchase the products of a particular company obviously depends on friendship with the officer, and there are many personnel changes at these military posts (Trans. p. 498). Even if there had been evidence from which future *volume* could be estimated, there is no basis for estimate of future *profits*.

1. Phillips' testimony concerned gross profit only—no evidence of business expenses.

All of Phillips' testimony relates to *Gross* profit. He introduced no evidence of his expense of doing business, so there is *no basis to estimate net profits*.

2. The uncertainties.

Phillips admits a profit "depends on the condition we were in in the base" (Trans. p. 320) but there is no evidence of what condition he was in at the respective commissaries.

3. The opinion as to future profit is pure guesswork.

Over the repeated objections of appellant on the grounds of lack of foundation and conclusions of the witness, Phillips (Trans. pp. 312-316), Phillips estimated that in the year after termination he might have made a gross profit of 20% to 25% on sales (Trans. pp. 319-320). Up to termination his gross profit for 12 months at Alameda Air Station was 7½% gross (Trans. p. 277) and for his specially se-

lected four months at Fort Ord, 5% gross (Trans. p. 302) and for the few months at Hamilton Field 4% gross (Trans. p. 302). He did not prove his total profit on all sales for the period he operated.

There is further and direct proof that the unsupported opinion of Phillips is pure speculation. He said that in order to realize his estimated future gross profit he would have to move his price up to that of everybody else and also eliminate competition (Trans. p. 320). Neither of these events occurred anywhere during his sixteen months of operation.

There is another essential factor missing if Phillips is to estimate his future gross profit. The evidence does not show what items (e.g. catsup, spinach, etc.) were sold at the various commissaries, yet Phillips says (Trans. p. 355) the amount of profit depends on what item is sold to a particular commissary at a particular time because the percentage of profit is greater on some items, less on others.

4. Competitors' prices prevent the estimated gross profit.

Hunt was the lowest price brand item on the shelves at the commissaries (Trans. p. 326) and there were only three different brands (Trans. p. 121). Hunt prices could not be increased to the level of the higher-priced competition, otherwise Hunt couldn't compete (Trans. pp. 356-357). This limitation is further shown but the fact that during the whole time Phillips was operating the differential between his *cost* and the *shelf price* of higher-priced similar products was about 22% (Trans. pp. 332-333). This is the differ-

ential that Phillips computed but in doing so he assumed that each competitor sold the same items in the same volume (Trans. pp. 348-350) (which was not the fact) and he made adjustment assumptions to take into account difference in sizes of cans among competitors (Trans. pp. 350-351, 362).

5. Chain store competition prevented the mark-up.

The opportunity for Phillips' mark-up is further limited by chain store competition with the commissaries. Hunt sold chain stores at the same price it sold to Phillips (Trans. p. 351) and Phillips could not raise his prices to any extent that would make the commissaries shelf price higher than at the nearby chain stores (Trans. pp. 351-352) otherwise the serviceman's wife would trade at the chain store. Mr. Steiger testified that the commissary shelf price of Hunt products was only 9% less than the Hunt shelf price at the chain stores (Trans. p. 503). The chain store prices were reduced on week ends (Trans. p. 498).

No. 15,216

IN THE

United States Court of Appeals
For the Ninth Circuit

HUNT FOODS, INC.,

Appellant,

vs.

WELLINGTON PHILLIPS and

H. W. LIHOLM,

Appellees.

APPELLANT'S REPLY BRIEF.

CUSHING, CULLINAN, DUNIWAY & GORRILL,
VINCENT CULLINAN,

1 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

FILED

JAN 24 1957

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
I. The statement of facts	1
II. The specifications of errors	2
(a) Appellant's right to interest, attorney's fees and costs	2
(b) Findings as to the nature of the arrangement	3
(c) Findings as to estoppel	4
(d) Findings as to performance and breach	4
(e) Findings as to the nature and origin of damages	6
(f) Findings on the issue of Hunt's knowledge of the contract	6
(g) Findings relative to the basis for determining damages	7
III. Argument	9
1. The reason for termination need not be stated....	9
2. The nature of the agreement	10
3. The mutuality question	13
4. The statute of frauds	17
(A) Cases cited by appellee	17
(B) Appellees' tardy assertion of a memorandum satisfying the statute of frauds	20
(a) The alleged defense cannot now be raised	20
(b) Exhibit 3 was not introduced as a memorandum	20
(c) The alleged memorandum was insufficient	21
(d) The alleged memorandum was not signed by Hunt	21
5. Any term, indefinite or not, which is for more than a year is within the statute of frauds	22

	Page
6. The equal dignities rule	23
7. The argument on damages	26
(a) Cases cited by appellee are not in point	26
(b) Prospective damages not awarded to a new enterprise	28
(c) The best possible proof was not introduced	28
(d) Appellees' guesses and speculations are not evidence	30
8. Failure to prove expense of doing business	31
IV. Conclusion	32

Table of Authorities Cited

Cases	Pages
Berkey v. Halm (1950) 101 Cal. App. (2d) 62, 224.P. (2d) 885	17
Brunvold v. Johnson (1939) 36 Cal. App. (2d) 226	13, 14
Bunbaum v. G.H.P. Cigar Company (Wis.) (1925) 206 N.W. 59, 188 Wis. 389	27
California Lettuce Growers v. Union Sugar Company (1955) 45 Cal. (2d) 474, 289 Pac. (2d) 785	3
E. I. du Pont de Nemours v. Claiborne (Cir. 8, 1933), 64 F. (2d) 224	12, 15
E. K. Wood Lumber Co. v. Moore Mill & Lumber Co. (1938) 97 Fed. (2d) 402	25
Edgar Brothers Co. v. Schmeiser Manufacturing Co. (1917) 33 C.A. 667, 166 P. 366	21
Ellis v. Klaff (1950) 96 Cal. App. (2d) 471, 216 Pac. (2d) 15	21
Fibre Board Products v. Townsend (1953) 202 Fed. (2d) 180	22
Hoffman v. Pfinsten, Wis. (1951) 15 N.W. (2d) 369, 26 A.L.R. (2d) 1132	12, 14, 27
Holsten v. Mullen (1927) 84 Cal. App. 1, 257 Pac. 545	18
J. A. Folger & Co. v. Williamson (1954), 129 Cal. App. (2d) 184, 276 Pac. (2d) 645	14
J. C. Millett Company v. Park & Tilford (1954) 123 Fed. 484	11, 16, 22, 23
Jegen v. Berger (1946) 77 Cal. App. (2d) 1, 174 Pac. (2d) 489	27
Jirshik v. Farmers and Merchants Bank (1951) 107 Cal. App. (2d) 405, 237 Pac. (2d) 49	12
Kirk v. Culley (1927) 202 Cal. 501	3
Lewis-Hale Co. v. Enterprise Fuel Company, 4th Circuit (1929) 33 F. (2d) 727	32
Lineman v. Schmidt (1948) 32 Cal. (2d) 204	3

	Pages
Monarco v. Lo Greco (1950) 35 Cal. (2d) 621, 220 P. (2d) 737	17
Muller v. Barnes (1956) 139 Cal. App. (2d) 847, 194 P. (2d) 505	3
Murphy v. Munson (1949) 95 Cal. App. (2d) 306, 212 Pac. (2d) 603	24
Natural Soda Prod. Co. v. City of L. A. (1943) 23 Cal. (2d) 193, 143 Pac. (2d) 12	26
Noble v. Reid-Avery (1928) 89 Cal. App. 75, 264 Pac. 341..	12, 14
Palmer v. Phillips (1954) 123 Cal. App. (2d) 291, 266 Pac. (2d) 85	20
Roberts v. Wachter (1951) 104 Cal. App. (2d) 281, 231 P. (2d) 540	19
Ruinello v. Murray (1951) 36 Cal. (2d) 687, 227 Pac. (2d) 251	10
Sessions v. Southern California Edison Company (1941) 47 Cal. App. (2d) 611, 118 Pac. (2d) 935	19
Seymour v. Oelrichs (1909), 156 Cal. 782, 106 Pac. 88	24
Sobelman v. Maier (1927) 203 Cal. 1, 262 Pac. 1087	26
Thatcher v. American Foundry (1947) 78 Cal. App. (2d) 76, 177 Pac. (2d) 332	10
Tuck v. Gudnason (1936) 11 Cal. App. (2d) 626, 54 Pac. (2d) 88	13, 18
Warner v. Channel Chemical Company (Wash. 1922) 208 Pac. 1104	29
West v. Wall Prather Company (1907) 7 Cal. App. 81	24

Codes

California Civil Code, Section 2309	21
---	----

Texts

49 Am. Jur. 636	21
49 Am. Jur. 665	21
49 Am. Jur. 704	21

TABLE OF AUTHORITIES CITED

v

	Pages
49 Am. Jur. 793	18
49 Am. Jur. 798	18
6 A.L.R. (2d) 1067	18
26 A.L.R. (2d) 1133	14
26 A.L.R. (2d) 1141	28
23 Cal. Jur. (2d) 357	21
3 Standard Law Review 294	13, 19

No. 15,216

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HUNT FOODS, INC.,

Appellant,

vs.

WELLINGTON PHILLIPS and

H. W. LIHOLM,

Appellees.

APPELLANT'S REPLY BRIEF.

I.

THE STATEMENT OF FACTS.

(Appellee's Brief pp. 2 to 8.)

The whole of the statement of facts by appellee concerns Phillips' *rights*—as developed by Phillips' report of a conversation with a dead man. These rights were never mentioned by Phillips prior to the death of Mr. Flynn, the employee with whom he dealt. In fact, during Flynn's life, Phillips admitted he owed money to Hunt and made no claim of any contract such as that asserted in this action, nor did he make any claim of damages.

There is a notable omission of any discussion of Phillips' *duties*. Nowhere in the brief is there any

discussion of the fact that Phillips could *not* be required to buy anything from Hunt (Tr. p. 232); that he *could* have devoted all of his time and efforts to his bidding and his brokerage business for others or either of these businesses; that more than 75 per cent of his business during the period in question was for others than Hunt; that he had no advertising or sales promotion duties; that he had no requirement of warehousing any stockpiles (Appellee's brief at p. 65 admits that Hunt delivered direct to the commissaries).

The \$21,500.00 question here is: If Phillips failed to buy anything from Hunt, if he devoted 100 per cent of his efforts to his other business selling for competitors under his bidding or brokerage arrangements, what could Hunt do? For what damages would Phillips be liable? The answers are: NOTHING! NONE!

II.

THE SPECIFICATIONS OF ERROR.

(Appellee's Brief pp. 8 to 29.)

(a) Appellant's right to interest, attorney's fees and costs (on the appeal from the judgment for appellant).

The brief for appellee cites no authorities whatsoever on the subject of interest and attorney's fees to which appellant is entitled on its cross-complaint.

The amount due to Hunts was liquidated and was represented by negotiable instruments. These instruments were in default (Tr. pp. 50-52). A belated

claim for damages cannot cut off the interest due under the documents. *California Lettuce Growers v. Union Sugar Company* (1955) 45 Cal. (2d) 474 at 487, 289 Pac. (2d) 785 at 793:

“California Lettuce correctly contends that the mere pleading of unliquidated counterclaims does not render unliquidated an otherwise certain or determinable debt owing to the plaintiff. The unliquidated counterclaims are given treatment as discounts, *not as payments made at the time the debt is due.*” (Emphasis added.)

See particularly:

Muller v. Barnes (1956) 139 Cal. App. (2d) 847, 294 P. (2d) 505;

Cf. *Lineman v. Schmidt* (1948) 32 Cal. (2d) 204.

Appellant’s counsel successfully proved the allegations of the cross-complaint. The complaint did not admit any setoff or cross-demand. Hunt, therefore, was required to bring suit on the trade acceptances for the amount due. The trial Court was empowered to award attorney’s as called for in the instrument (*Kirk v. Culley* (1927) 202 Cal. 501 at 508 to 509).

(b) Findings as to the nature of the arrangement. (Appellee’s Brief p. 9.)

In our opening brief at page 9, we pointed out that there was no basis for a finding, that Phillips agreed to perform the “duties and obligations of an exclusive military jobber.” There is no transcript reference suggested by appellee to support such a

finding. Where is the evidence of what those duties were? Do such duties include the right to devote all a person's time to the business of others without liability therefor?

Appellant's opening brief sets forth the facts pertinent to this question at pages 8 and 9 and the law applicable at pages 18 and 19.

(c) Findings as to estoppel. (Appellee's Brief pp. 12-13.)

Reduced to its essentials, appellee's argument is that, to some extent, part of the quarter of a million dollars of sales done by Phillips in his bidding business was due to bids made before the end of 1951. But Phillips testified that in the bidding business (Tr. p. 366): "You get your forms in December and you start delivering in January." The Hunt arrangement started December 1, 1951. Phillips also testified (Tr. p. 171): "in the bidding business you buy something and sell it; you have your gross immediately."

(d) Findings as to performance and breach. (Appellee's Brief p. 14.)

Phillips' discussion (p. 17), of the balance due at time of termination is surprising in face of Phillips' own admission (Tr. p. 131) that he owed Hunt about \$25,000 at the time of termination. The further proof of this is found in the credit ledger from Hunt's records (Exhibit AN). The evidence showing that Phillips was 4 to 5 months in default is set forth in part 1 of the appendix to our opening brief. The last few pages of Ex. AP show clearly the delay in payment.

It is difficult to follow appellee in the discussion of the facts under this heading. For instance he says, at page 14 of the brief, that there was no discussion by him of a credit limit but, at page 11 of the brief, he says the limit of credit was \$5,000.

Appellee suggests that the position taken by Hunt would require Phillips to finance Hunt sales. The evidence is uncontradicted that Hunt sold to Phillips, a purchaser who was free to resell at any price if he wanted. The sales to the commissaries were *Phillips'* sales, *not Hunt's*.

Considerable space is devoted by appellee to discussing some orders at two bases which Hunt salesmen had made and turned over to Phillips to process. His brief *assumes* that these orders had been recently placed, yet there is no evidence as to *when* the orders were placed. The orders may have been placed much earlier and may have been ready for payment at the time. At all events Phillips, his counsel and the Court said they were *de minimis* (Tr. p. 516). There is no basis in the record for appellee's statement that Hunt was making Phillips finance these particular sales. (Incidentally, the two bases were assigned to Phillips in December, 1951—why hadn't he sold them prior to October of 1952? Perhaps he was too busy with his non-Hunt business.)

Appellee's statement of the government's delay in paying is incorrect. The evidence on this matter is set forth in part 1 of the appendix to our opening brief. With respect to appellee's comments on the billing practices of Hunt, it must be pointed out that the

uncontradicted evidence is that the practice of treating invoices in default after 10 days is a custom peculiar to the canning industry but known to everyone in the business (Tr. pp. 488 to 489).

(e) Findings as to the nature and origin of damages. (Appellee's Brief pp. 19 to 21.)

Appellee's brief fails to discuss the question of *causation* of damage; yet it is the burden of appellee to prove causation of damage here as in any other case (see appellant's opening brief p. 13 and pp. 35 to 36). Apparently appellee feels that Finding VIII (submitted by him) is of no importance.

The gist of appellee's case and of the findings is that lack of capital and inadequate credit resources prevented Phillips from continuing in a profitable business, but appellee stipulates in his brief (p. 10, lines 8 to 11) that the Hunt business was NOT the cause of Phillips' inadequate credit resources. This stipulation is a direct and categorical denial of the allegations of paragraph IX of the complaint which appears at page 13 of the transcript.

Appellee discounts Phillips' own letters which boast of his prosperous bidding business after termination, all of which letters were in evidence, by the amazing device of stating that Phillips lied in those letters.

(f) Findings on the issue of Hunt's knowledge of the contract. (Appellee's Brief p. 21.)

In our opening brief (pp. 14 and 15) we pointed out that there is no evidence to support a finding that any Hunt executive officer knew of such a contract

as that found by the Court. Appellee fails to designate any evidence to support a finding that Hunt knew of the contract. He argues only that there is no proof that the officers of Hunt didn't know about the contract, yet the burden is on Phillips to show knowledge of the contract in question on the part of executive officers. The law, popularly known as the "Equal Dignities Rule", is discussed at pages 30 to 34 of our opening brief, and *infra* in this brief under that heading.

(g) Findings relative to the basis for determining damages.

Appellee at page 23, line 24, of his brief acknowledges that sometimes a profit is made because of market price changes. This does not strike us as unusual, nor did it strike the trial Court as unusual (Tr. p. 123). And it indicates further that profits can't be predicted. That some commissary officers stated they were "ready" to buy Hunt products is not proof that the purchasing officer *had* ordered or agreed to buy Hunt products. This evidence is discussed in detail at pages vi and vii of the appendix to appellant's opening brief. The findings do not give *any* clue as to the basis for awarding damages.

The brief hints (p. 24, line 17) that at Alameda 54 food items were introduced. Phillips testified (Tr. p. 147) the highest number of items at any place at the time of termination was 35; that the figure of 55 at Alameda included items *and* sizes (thus peas, which come in two different sized cans, give a figure of 3, one for the item and 2 for the different sized cans; (Tr.

p. 272)); that the number of items sold at a place varied from month to month, sometimes less than half the previous month (Tr. p. 299).

Appellee continues to make assumptions (brief p. 25, line 24) and estimates (brief p. 25, line 26) of volume instead of proving actual experience. At pages 26 to 28 of his brief, appellee, in discussing damages, estimates profits he would have made immediately after termination. But when he discusses estoppel he says he was bound to lose money for a number of years! (See p. 38 of appellant's opening brief.)

Hopes become facts easily for appellee. Thus a commissary officer's statement that he "intended" to take on the Hunt line at some time in the future, if other competitive lines were eliminated becomes (brief p. 28, line 20) a "last minute acceptance of the full line."

Appellee's discussion of the alleged proof of damages (pp. 27 to 30 of his brief) is notable for the absence of any citation to the transcript. Most of his statements have no support at all in the record. Thus, at page 28, line 4 he says that his traveling expense amounted to \$6500.00 (a figure repeated in his brief at page 65, without transcript reference). **There is not a word in the record of traveling expense of \$6500.00 or any other amount.** In the next line he says one clerk at a salary expense of \$3600.00 a year could handle the clerical work—**yet there is no evidence whatsoever as to what a clerk is paid or whether one or more clerks would be needed.** There is no citation of pages of the transcript to support the statements in the brief.

In this portion of the argument the brief of appellee again refers to sales volume at other bases as being seven times greater than the volume at Alameda. The absence of any foundation for this estimate is demonstrated at pages v to vi of appendix to appellant's opening brief. This section of the brief is replete with unfounded future prophesies. Thus at page 28, he says that *when* a greater number of items of Hunt *would be* established at the bases, the volume at the bases would be a certain amount. The record shows that at many of the bases there were only one to four items on the shelves and that the number of items varied from month to month (Tr. p. 299).

On page 29 of his brief, Phillips gives himself a \$40,000.00 gross profit if he had continued another year and a \$30,000.00 net profit. This assumes, among other things, a \$10,000.00 expense but where is the evidence of expense? There is no evidence of what his expenses were and these figures are invented by the brief writer to avoid exposing appellee's fatal defect in proof. (Appellant's brief p. 39.) Further reference to the fact that these figures are invented for the purpose of the appellee's brief is made under Section 8 of the argument hereinafter.

III.

ARGUMENT.

1. THE REASON FOR TERMINATION NEED NOT BE STATED.

This point, set forth in our opening brief pages 17 and 18, is apparently conceded by appellee.

2. THE NATURE OF THE AGREEMENT.

The argument of appellee on this subject rests on the ground that he felt he was bound to lose money for some years and that therefore the contract was to last for those years. But when he argues on the question of damages he claims that after 15 months he was moving into a most profitable era.

The cases cited in our opening brief at pages 18 and 19 are decisions from the United States Supreme Court and from the 4th, 6th, 7th and 8th circuits involving facts substantially similar to those here involved. Appellant's offer of proof as to the industry custom of making jobber agreements terminable at will was rejected (Tr. 505-506).

See also *Ruinello v. Murray* (1951), 36 Cal. (2d) 687, 227 Pac. (2d) 251, cited at page 18 of our opening brief.

Under the law, if a plaintiff's employment is based on a consideration "other than the services to be rendered" and unconscionable injury would result by termination at will, the employment cannot be terminated at will (*Ruinello v. Murray*, supra). Both elements must be present but here there is neither unconscionable injury nor an independent consideration.

Phillips was not *required* to give up any other business. Even if that were so, abandoning other interests in order to serve a party is not a consideration entitling a plaintiff to a continuance of his employment (*Thatcher v. American Foundry* (1947), 78 Cal. App. (2d) 76, 177 Pac. (2d) 332. See also cases cited in

our opening brief at pages 24 and 25.) Appellee quotes (appellee's brief pp. 33 and 34) from *Millet v. Park & Tilford*, a District Court case. The Court there acknowledged the rule that the consideration given by the plaintiff must be "*other than the service to be rendered by the employee or agent*"; the Court itself italicized those words and it found that: (a) Millet, the plaintiff, had agreed to buy defendant's products. Phillips did not. (See our opening brief p. 9). (b) Millet was required to maintain warehouse facilities—Phillips was not because, as admitted by appellee at page 65 of his brief, *Hunt delivered the merchandise directly to the commissaries*. (c) Millet tied up substantial amounts of its capital in inventory and accounts receivable. Phillips did not. He put no capital into the Hunt operation but operated on Hunt monies over the protests of Hunt. The accounts receivable were assigned to Hunt (Exhibit E) to protect Hunt, but Phillips paid no attention to the assignment (appellant's opening brief appendix p. ii).

In the *Millet* case, as shown by the quotation on page 34 of appellee's brief, the Court held that *these three just mentioned factors were the necessary additional considerations to prevent termination at will*. But *none* of these factors are present in the case at bar.

The appellee's brief fails to show what "considerations other than the services rendered" were undertaken by Phillips—how did his engagements differ from the illusory considerations given by the plaintiffs in the cases cited in our opening brief at pages

20-21, such as *Hoffman v. Pfinsten*, Wis. (1951) 15 N.W. (2d) 369, 26 A.L.R. (2d) 1132, and *Dupont v. Claiborne* (8th Circuit 1933), 64 Fed. (2d) 225.

The only claim made by Phillips as to "unconscionable hardship," is that at the time of termination his credit and capital were low. His brief, page 20, line 8, admits this was not caused by Hunt. As shown on our opening brief pages 12 to 14 there is no proof that his credit or capital condition deteriorated or, if so, was due to the Hunt operation.

Furthermore, the loss of greater benefits is not unconscionable hardship. (*Jirschik v. Farmers and Merchants Bank* (1951), 107 Cal. App. (2d) 405, 237 Pac. (2d) 49.)

Appellee also relies upon *Noble v. Reid-Avery* (1928), 89 Cal. App. 75, 264 Pac. 341, which is not at all in point. There the plaintiff had bought a large quantity of welding rods and defendant agreed not to sell similar rods in plaintiff's territory until the plaintiff had sold all the rods. Defendant did sell similar rods in the area while plaintiff still had a supply on hand. The Court said that plaintiff's obligations had been fully executed (appellee acknowledges this fact later in his brief at p. 38).

3. THE MUTUALITY QUESTION.

(Appellee's Brief pp. 36 to 41.)

In our opening brief (pp. 10 and 20) we showed that Phillips did not agree or otherwise bind himself to give up any business. He did not agree to maintain a stock of goods in inventory and this is acknowledged in his brief, at page 65, where he admits that Hunt delivered for him direct to the commissaries.

On the question of mutuality, the principal authority submitted by appellee is *Tuck v. Gudnason* (1936), 11 Cal. App. (2d) 626, 54 Pac. (2d) 88. This case is described in 3 *Standard Law Review* 294 as unusual in the extremely great detriment that would have been suffered by plaintiff if the contract were not enforced. In that case the plaintiff was a Chinese woman who operated a small hemstitching and dress-making shop. Defendant, a manufacturer, promised that (a) if she would *abandon* her business, (b) devote her time to working for defendant *exclusively*, (c) make dresses for no one else, (d) if she would lease larger premises for 5 years and (e) install expensive new equipment, all at plaintiff's expense, that defendant would employ her and her equipment for 5 years. All this the plaintiff did but defendant refused to perform. The points of distinction between that case and the case at bar are numerous and obvious. It should be observed that this decision reversed a nonsuit and in the re-trial judgment was for defendant (26 Cal. App. (2d) 468).

Brunvold v. Johnson (1939), 36 Cal. App. (2d) 226, cited at page 37 of appellee's brief: the Court there

points out, that the defendant's answer admitted that plaintiff had been employed as an agent "for a valuable consideration." Since mutuality is a question of consideration, this is an admission by the pleadings of mutuality. The Court therefore said that *the issue in dispute was not mutuality* but whether a change in the commercial relations between the United States and Philippines affecting cordage was a sufficient contingency to warrant termination of the contract. It may also be noted that in the *Brunvold* case the plaintiff, a former salesman, for defendant, was devoting his full time to the sale of defendant's cordage products.

Noble v. Reid-Avery was the case of an executed contract so the question of mutuality was not involved.

In *J. A. Folger & Co. v. Williamson* (1954), 129 Cal. App. (2d) 184, 276 Pac. (2d) 645, the Court at page 187 of the official report said:

"... We do not consider that an agreement to tender 'as many of its shipments as its general business and market conditions will warrant' furnishes an objective test . . ."

(This is what Phillips says *his* agreement was.)

Hoffman v. Pfinsten (Wis. 1951), 50 N.W. (2d) 369, is cited at page 20 of our opening brief and is a case virtually on all fours with the case at bar. The language of the contract in that case is set forth in 26 A.L.R. (2d) at 1133. A reading of the language there shows that appellee has not understood the case.

The only answer appellee has to the case of *Friedman v. McKay Leather Co.*, quoted at pages 20 to 21 of our opening brief, is that the Court said that that case differed materially from an exclusive agency. *But the distinction was made in connection with the discussion of the question of damages, not with respect to the question of mutuality.* The case involved a claim for commissions on sales made by defendant in plaintiff's territory and of course the damages are far more certain if the plaintiff had an exclusive than if he did not. Where he did not have an exclusive his damages are necessarily speculative because other agents would have made the sales, said the Court.

Misquotation of authority by appellee.

E. I. du Pont de Nemours v. Claiborne (Cir. 8, 1933), 64 F. (2d) 224 is discussed in some detail at page 21 of our opening brief. In appellee's brief at page 39 he **purports** to quote verbatim from the contract there involved and then states that the quoted words make the contract, "by its terms," expressly terminable at will. **But this quotation is NOT from the contract—**rather, the quotation is a portion of the Court's summary of the legal position of the plaintiff which parallels Phillips' here and which there resulted in judgment for defendant. The opinion sets forth the contract involved in full; it contains **none** of the language quoted by appellee, nor any similar language. Furthermore, the quotation of the Court's language is also inaccurate, in that it omits key words to change the meaning. In that case the Reno Com-

pany was the plaintiff-distributor and du Pont the defendant-manufacturer. Compare the actual quotation with that given by the appellee in his brief and note where the appellee puts *his own* underscoring.

Language as used by Court:

Quotation by Appellee:

“Reduced to its lowest terms, the claim of the Reno Company . . . was an agreement that it should be the sole distributor . . . so long as the du Pont Company was satisfied with its services and so long as it (the Reno Company) chose to perform the services.” (Under-scoring ours.)

“So long as the du Pont Co. was satisfied . . . and so long as it chose to perform” (Under-scoring appellee’s.)

NOTE: The key words in the parentheses after the word “it” were omitted by appellee, which, with his underscoring, reverses the meaning.

In distinguishing other cases cited by us the appellee argues that in them the plaintiffs did not offer “other considerations,” inferring that Phillips did but, as noted above in discussing the *Millet v. Park & Tilford* case, there were no “other” considerations offered by Phillips.

The discussion in appellee’s brief (p. 41) of our argument that the sales to commissaries was a new business for Phillips, completely misses the point. The point is whether the business was new to *Phillips*, *not* to Hunt. Phillips himself admitted that this type of business was new to *him* and was a “drastic change” (Tr. p. 168).

4. THE STATUTE OF FRAUDS.
 (Appellee's Brief pp. 41 to 49.)
 (A) CASES CITED BY APPELLEE.

The cases cited by appellee are patently distinguishable.

Berkey v. Halm (1950) 101 Cal. App. (2d) 62, 224 P. (2d) 885: The plaintiff quit entirely his insurance business, turned over all his client's and his business to defendant in exchange for the promise of a salaried position with defendant and for some stock in the defendant corporation. The defendant assured the plaintiff he was the owner of the shares and that defendant had performed. Later the defendant refused to recognize the agreement and discharged plaintiff. The stock had never been transferred to plaintiff. Thus, the plaintiff ceased all other work and gave up *all* his business to defendant who deliberately defrauded him. The acts of deliberate fraud are frequently mentioned by the Court in its opinion.

Monarco v. Lo Greco (1950) 35 Cal. (2d) 621, 220 P. (2d) 737: The plaintiff devoted his life to working on his stepfather's land on the oral promise of receiving the property by will. As a result of plaintiff's efforts the value of the property increased from \$4,000.00 to \$100,000.00. From the start plaintiff was dissuaded by his stepfather from purchasing similar property and improving it for himself. The stepfather executed the will and showed it to the plaintiff and then secretly revoked the will. This case therefore involved the following elements none of which

is present in the case at bar: The actual and deliberate fraud of the stepfather; the gross unjust enrichment of the stepfather; quantum meruit would not lie because of the peculiar nature of the services involving continuation of a close family relationship. The Court itself limited its decision to the very special situation before it and, at page 626 of the official reporter, the opinion points out that it rests upon the fact that the services were of a peculiar nature involving the continuation of a close family relationship.

Tuck v. Gudnason (1936) 11 Cal. App. (2d) 626, 54 P. (2d) 88, is the Chinese dressmaker case discussed above. That case involved a nonsuit, and on retrial judgment was for defendant (26 Cal. App. (2d) 468). As noted there, the plaintiff gave up all of her business, signed a long lease, bought expensive shop equipment and devoted her full time to defendant.

Holsten v. Mullen (1927) 84 Cal. App. 1, 257 Pac. 545, has no bearing whatsoever on the question involved in the case at bar. That case concerned *joint venturers*, one of whom, the defendant, took a lease under his name alone for both parties and with the funds of both parties added improvements to the premises. The Court decided the case on the doctrine of part performance (p. 4 of the opinion). Part performance *does* apply to joint venture agreement (49 *Am. Jur.* 793) but does *not* apply to contracts which are not to be performed in a year (49 *Am. Jur.* 798; 6 *A.L.R.* (2d) 1067).

Roberts v. Wachter (1951) 104 Cal. App. (2d) 281, 231 P. (2d) 540: This case involved only the sufficiency of a pleading as against demurrer. The complaint alleged plaintiff by written contract had waived his right to sue in quantum meruit. The Court stresses the fact (pp. 286 and 289 of the opinion) that this waiver would prevent him from recovering the reasonable value of his services.

Sessions v. Southern California Edison Company (1941) 47 Cal. App. (2d) 611, 118 Pac. (2d) 935: The plaintiff was told by his employer that he could quit work without losing his rights to a pension, as of the time he came to the age of retirement. The pension plan of the defendant company was later changed to require continuous employment up to the age of retirement. The Court found that the employee would not have ceased his employment except for the promise of the employer and that he would have been able to work up to the age of retirement. The plaintiff therefore irrevocably lost a prior right which he had no means of recovering if the statute of frauds were allowed as a defense, because he had given up his pension rights irretrievably. This case is described as "unique" in 3 S.L.R. 294.

There is no evidence that the Hunt operation caused depletion of Phillips' capital or credit. He says (appellee's brief p. 45) that the loan of \$12,000.00 to his limited partner would not have been made *if* he had known of the prospective termination. There is no evidence to support this statement. On the contrary, the evidence shows that Phillips lent the money to his

partner because the limited partner was in Federal tax difficulties (see discussion at p. 13 of our opening brief).

**(B) APPELLEE'S TARDY ASSERTION OF A MEMORANDUM
SATISFYING THE STATUTE.**

Appellee now takes the position that plaintiff's Exhibit 3 is a written memorandum of the oral agreement. No such assertion was ever made until after the close of the trial. There is *no finding by the trial Court* as to a memorandum.

(a) The alleged defense cannot now be raised.

Each count of the complaint (Tr. p. 10 and p. 15) alleges an oral agreement violative of the statute of frauds. It was therefore incumbent on the plaintiff to plead facts which lift the contract from the statute (*Palmer v. Phillips* (1954), 123 Cal. App. (2d) 291 at 295, 266 Pac. (2d) 85). But Phillips *did not plead any memorandum*. The complaint relies on estoppel, which is not necessary if there were a memorandum. Since there is no allegation in the complaint as to any memorandum, his case must rest on estoppel alone, as did the lower Court's findings.

(b) Exhibit 3 was not introduced into evidence as a memorandum.

Plaintiff's Exhibit 3 was introduced in evidence as a calling card by which Phillips might make himself acquainted at the commissaries (Tr. p. 115). If it had been introduced as a memorandum under the statute, then parol evidence would be inadmissible to explain

it. (23 *Cal. Jur.* (2d) p. 357; 49 *Am. Jur.* 636; *Ellis v. Klaff* (1950), 96 *Cal. App.* (2d) 471, 216 *Pac.* (2d) 15). No objection was made to testimony regarding the oral agreement but objection *could* have been made under the parol evidence rule *if* defendant were advised by the pleadings, or otherwise, that Phillips was asserting that this introductory notice was a memorandum satisfying the statute. Plaintiff's whole case was based on estoppel, not on a memorandum. The attempt now to describe Exhibit 3 as a memorandum is a recognition of the failure to prove estoppel.

(c) The alleged memorandum was insufficient.

In any event the alleged memorandum was incomplete. It fails to state the price, the duration, the terms of payment, or the bases to be covered (49 *Am. Jur.* 665). A memorandum must contain all the essential terms of an agreement.

Edgar Brothers Co. v. Schmeiser Manufacturing Co. (1917), 33 C.A. 667, 166 P. 366, held that a memorandum made in April 1912 which stated that plaintiff was "to have exclusive agency in Imperial Valley for 1912, and by ordering one car before February 1, 1913, can have the agency for same season," was insufficient to satisfy the statute because of incompleteness and uncertainty. (See also *Ellis v. Klaff* (1950), 96 *Cal. App.* (2d) 471, 216 *Pac.* (2d) 15).

(d) The alleged memorandum was not signed by Hunt.

If appellee relies upon a memorandum, he must prove the authority of Flynn to sign (49 *Am. Jur.* 704; *California Civil Code* 2309). Phillips admits that the

jobber arrangement was a “unique” one for Hunt (Tr. p. 446) and his brief (p. 7) admits Hunt never had similar agreements. Therefore Flynn’s written authority must be proved by appellee (see discussion pp. 30 to 34 of our opening brief). The record shows it was never authorized by anyone superior to Flynn (Tr. p. 421).

5. ANY TERM, INDEFINITE OR NOT, WHICH IS FOR MORE THAN A YEAR IS WITHIN THE STATUTE OF FRAUDS. (Appellee’s Brief pp. 49 to 51.)

Appellee makes virtually no argument on this subject. This is understandable in view of the decision by the Ninth Circuit in *Fibre Board Products v. Townsend* (1953), 202 Fed. (2d) 180, discussed at p. 28 of our opening brief.

The distinguishing facts in the case of *J. C. Millett Company v. Park & Tilford* (1954), 123 Fed. supra 484, a case frequently cited by appellee have been shown previously herein. The decision in that case held (p. 493) that the arrangement was for an indefinite duration of one year terminable by three months’ notice.

“Weighing the substantial outlay of money by Millett in taking on the distributorship and the difficulty in getting a distributorship started against the large economic stake Park & Tilford had in giving over the distribution of its products, I find from all the facts that one year is the reasonable period of time before which termination could not be effected. Bearing in mind the average inventory maintained by Millett and the

average depletion of that inventory as well as the other facts, I find that three months is a reasonable period of notice. Thus the distributorship could be terminated at the end of one year by three months' previous notice or after such notice at any subsequent time."

None of the factors mentioned in the *Millett* case is present in this case.

The statute of frauds is designed to protect a defendant in the case like this where the plaintiff waits until an employee is dead and then claims he entered into some "unique" contract with the dead man. While the employee Flynn was alive, Phillips never claimed any contract but, on the contrary, admitted his own liability to Hunt and sought time to clear up those liabilities.

6. THE EQUAL DIGNITIES RULE.

(Appellee's Brief pp. 51 to 54.)

In our opening brief, page 30 to page 34, we discussed the law which requires proof of written authority of an agent to enter into a contract such as that found by the Court. At page 15 of that brief we set forth the facts material to this question. We pointed out that some cases make exceptions with respect to *executive officers* of a corporation on the theory that those are the people who are the corporation in so far as contracts are concerned. That exception does not apply here because no executive officer of Hunt knew of any contract such as that found by the Court.

Appellee does not claim that Flynn (or Miller) was an officer of Hunt. He argues only that they must have been some sort of executives. But the exception applies only to executives who are *officers*. Neither Flynn nor Miller were officers and neither were executives of Hunt. (We fail to see how Miller comes into it at all since Phillips testifies that the whole agreement was made with Flynn) (Tr. p. 170). Appellee's brief page 51 states that Flynn "must have" told Miller about the arrangement but this is appellee's guess only, without support in the evidence. He also states that the officers of Hunt "must have" known there was some arrangement with Phillips. This, again, is but a guess without support in the evidence and even that guess is not enough, under the rule in *Seymour v. Oelrichs* (1909), 156 Cal. 782 at 791, 106 Pac. 88 at p. 92, discussed, with other cases, at pages 32 and 33 of our opening brief.

Murphy v. Munson (1949), 95 Cal. App. (2d) 306, 212 Pac. (2d) 603, is cited by appellee. In the first place that case did not involve a corporation so it has no bearing on the question of the power of corporation employees. The case is quite different in other respects. It involved a document (1) signed by the defendant's amanuensis (2) at the defendant's specific request and (3) the document was ratified and confirmed in writing by the defendant (4) with "full knowledge of the entire transaction and of all communications with the plaintiff."

The case of *West v. Wall Prather Company* (1907), 7 Cal. App. 81, cited by appellee, is manifestly differ-

ent from this case. There the president of the corporation terminated the plaintiff's lease and the corporation executed a new lease with others. Thus the action was that of an executive officer, the corporation knew the lease had been cancelled by the president and so, in executing a new lease, held out the president as authorized to terminate the plaintiff's lease.

The Ninth Circuit opinion in *E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (1938), 97 Fed. (2d) 402 at pp. 408 and 409 controls on this point.

"We need not here decide what rule is applicable in a case involving an executive officer of a corporation, for there is no testimony in the record before us from which it may be inferred that Carl R. Moore was an officer of appellee corporation."

... In this case there is no evidence from which it could be inferred that appellee represented either that its agent had written authority or that it would not avail itself of the defense of the statute. . . ."

(Other quotations from this case are at page 31 of our opening brief.)

Appellee's brief at page 7, lines 20 to 22 *admits* that:

"The Phillips arrangement was unique—Hunt had no similar arrangement with any other person or firm in any district."

This quotation from the appellee's brief renders incongruous his argument at page 53 that the arrangement was usual in the ordinary course of business.

The above quoted admission by appellee makes unnecessary any further elaboration on the question of ostensible authority discussed in our opening brief page 33.

7. THE ARGUMENT ON DAMAGES.

(a) Cases cited by appellee are not in point.

Natural Soda Prod. Co. v. City of L. A. (1943), 23 Cal. (2d) 193, 143 Pac. (2d) 12, was a tort action. The defendant city flooded plaintiff's property causing severe damage to its manufacturing plant. Plaintiff had operated a salt plant for 5 years in a dry lake bed and then undertook to convert it so as to increase production. The city diverted the river and flooded the whole lake bed damaging the plant and reducing the value of the salt beds. The Court held that a basis for prospective damages was established because the sales of plaintiff in the preceding 5 years were stable; detailed figures were introduced of all his actual expenses; and the capacity of the converted plant had been increased to a specific tonnage per day over the known production of the old plant (Phillips admits that his profits varied from base to base and from time to time depending on the state of competition and other factors and he made no attempt to show what his expenses were).

Sobelman v. Maier (1927), 203 Cal. 1, 262 Pac. 1087, cited at page 55 of appellee's brief was an action against a purchaser who had agreed to buy a specified number of the plaintiff's products at specified prices.

This is a rather clear case in which damages can be determined by elementary arithmetic.

In *Bunbaum v. G.H.P. Cigar Company* (Wis.) (1925), 206 N.W. 59, 188 Wis. 389, cited at page 56 of appellee's brief, the plaintiff planned to give up the agency because he was losing money and the defendant urged him to continue, assuring him that business would increase. Defendant's own employees determined the sales policy for plaintiff. When the market changed for the better, defendant terminated the agency and commenced selling the cigars itself. The plaintiff's evidence in that case set forth in detail the sales made by defendant for one year after termination and the expenses of sale and the damage awarded was based on the net that defendant actually made in the year after termination. This is obviously quite different proof than that produced by Phillips. The 1951 Wisconsin case, of *Hoffman v. Pfinsten*, cited earlier in this brief, represents the law applicable to the facts here.

Jegen v. Berger (1946), 77 Cal. App. (2d) 1, 174 Pac. (2d) 489: The plaintiff, who was an operator of a laundry, sued for loss of business due to sale to him by defendant of a defective mangle. The evidence showed that a new mangle had capacity of 18 to 20 feet a minute and he knew the capacity of the old mangle. Therefore, plaintiff was allowed to testify that the defective new mangle operated at only 25 per cent capacity. The plaintiff knew the amount of business he could handle and therefore could estimate what business he had to turn away. This proof was

obviously more than a guess. In fact, the court pointed out that: "It is a matter of common knowledge that during the war years laundries had more business than they could handle." Therefore, in that case, the Court knew the business that could be done if the mangle were 100 per cent efficient and, so, could determine the loss resulting from a mangle that operated at only 25 per cent capacity.

(b) Prospective damages not awarded to a new enterprise.

California decisions pertinent on this question are set forth in our opening brief pages 34 and 35.

In 26 *A.L.R.* (2d) at p. 1141, a recent annotation, it is stated:

"... the majority of the later cases which consider the question (hold) that such a contract is uncertain and unenforceable unless the business was started *prior to the execution of the contract* ... " (Emphasis added.)

(c) The best possible proof was not introduced. (Appellee's Brief pp. 58 to 60.)

Appellee apparently feels that it is up to defendant to prove the plaintiff's case. He says the invoices were in Court, implying that it is the duty of defendant's counsel to sift through cartons of jumbled invoices which he himself had not separated or summarized. The transcript, at pages 153 and 293, reflects how disarranged the invoices were. In fact, it will be noted that (Tr. p. 153) the direct examination of Mr. Phillips was interrupted because the plaintiff's evidence on damages was not in shape for presentation.

The 1952 income tax return of the appellees was amended by their accountant three years later (in 1955) because it wasn't until then that some of the 1952 invoices were brought to the accountant's attention (Tr. p. 387).

Appellee's summary of *Warner v. Channel Chemical Company* (Wash. 1922) 208 Pac. 1104 is erroneous. He says that the contract there involved terminated "in *early* 1920" but the facts actually were that the termination occurred sometime after September of 1920, which is hardly the "early" part of the year. In that case the record of sales in 1918, 1919 and 1920 were before the Court. The Court noted that the contract called for a 10 per cent increase in volume each year which plaintiff had more than met. The trial occurred in the middle of 1921 and the 1921 sales data to date of trial were in evidence. The Appellate Court held that damages could be assessed on the basis of the 1921 sales *only* but that no opinion evidence should be permitted as to estimated 1922 sales. The trial judge had said he could find that the 1922 sales would equal the 1921 sales but the appellate Court held that this would involve the same amount of speculation as if he were to say that the sales would have increased in the next year. Appellate Court held that *any* opinion as to 1922 sales would be speculation. The upper Court said of the trial Court:

"... But he further held that in 1922 respondent could have equaled his 1921 sales. This, it seems to us, is as much a speculation as it would have been to have held that the sales could have been increased. While, if respondent lived and

kept his health, he would undoubtedly have made sales in 1922, yet it seems to us that that time was too far in the future, and its possible conditions too much dependent upon what might happen, to permit anyone to say with reasonable certainty what sales could have been made. Since the prospective sales for 1922 could not be determined with reasonable certainty, no recovery on account thereof can be allowed."

(d) Appellee's guesses and speculations are not evidence.

The material set forth on pages 60 and 61 of appellee's brief is pure guess and speculation unsupported by the evidence. There are, of course, no transcript references. There is no evidence upon which sales at Alameda Naval Air Station can be compared with sales at other commissaries. See, for instance, Phillips' testimony under cross-examination (Tr. pp. 322 to 323) where he admits that he started selling to Fort Ord in December 1951, but that the sales varied tremendously and that the number of items sold to Fort Ord were not consistent during the year 1952 and that the same was true of Hamilton Air Field. Even Phillip's estimate of the percentage of gross profit he might make is based on so many contingencies that his testimony is, in the language of President Franklin Roosevelt, exceedingly "iffy" (Tr. p. 320, lines 8 to 14).

The whole case of appellee is based on assumptions as to what he sold to commissaries without proof of his actual volume (For example, Tr. pp. 313 to 315). The detail is set forth in Part II of the Appendix to appellant's opening brief.

The weakness of Phillip's claims with respect to his performance is illustrated by a colloquy between the Court and Phillips himself. (Tr. 123.)

"The Court: . . . you sold him some kind of a commodity later on and because there was a change in the market conditions you made more profit, is that right?

"The witness: Yes, Sir.

"The Court: What is extraordinary about that?"

8. FAILURE TO PROVE EXPENSE OF DOING BUSINESS.

(Appellee's Brief p. 65.)

For the second time in his brief appellee says that his traveling expense was \$6500.00 in the year 1952. The other occasion was at page 28 of the brief mentioned earlier herein. Again, he cites no page of the transcript. There is no evidence of any traveling or other expense in the whole record in this case. The record shows that (Tr. p. 131) the largest item of expense was traveling and billing but *no amounts* were ever given. Phillips' statement in the brief that increased volume would not require more than one office clerk has no foundation in the evidence. Here again, of course, there is no citation of the record by appellee. This is pure invention on the part of the brief writer.

At page 65 of his brief appellee also says that the expense of handling the Hunt business was "about \$10,000" and *there is no evidence whatsoever on this point*. Similar misstatements are elsewhere made in the brief and are referred to in earlier sections of this brief.

Thus the fatal lack of proof referred to on our opening brief at page 39 stands established for lack of an answer by appellee. In this portion of opposing counsel's brief he substitutes his guess to supply figures at which even his client would not guess.

The case of *Lewis-Hale Co. v. Enterprise Fuel Company* 4th Circuit (1929) 33 F. (2d) 727 at 730 is quoted at page 38 of our opening brief and has not been distinguished by appellee.

IV. CONCLUSION.

On the damage question, Phillips has failed to introduce any evidence of his expense of doing business. He did not show the business he actually did as a basis for estimating future profits but contented himself with substituting guesses as to the actual sales volume during the time he handled the Hunt line. To this fictitious volume he applies a percentage of profit that had no relation to the profit he actually made.

When arguing that he has suffered unconscionable hardship to qualify for the estoppel he claims he was operating at a loss; but when he argues damages he claims he had just reached the era of highest profits.

He has not been able to show that any executive officer of Hunt Foods knew of any such arrangement as that which Phillips claims he made with the dead man, Flynn. This is part of his proof which he neglected.

On the question of mutuality, Phillips has failed to show that he had any obligations. The evidence shows that he was free to and did devote as much time as he wished to other businesses.

The arrangement was terminable at will and was actually terminated for good cause. Phillips was in default virtually from the start of his dealings in this new type of business.

It is apparent that Phillips never had the financial resources to handle this type of business. The more sales he made the greater his debt to Hunt. If he could have sold the volume he predicts in his brief, Hunt would have to finance him for months with sums exceeding \$150,000.00. His delay in payments became greater with each passing month. Hunt never agreed to be his banker.

On the Hunt cross-complaint, the admitted debt was due in October and November 1953 and the judgment for appellant should include interest thereon and attorney's fees.

Dated, San Francisco, California,
January 10, 1957.

CUSHING, CULLINAN, DUNIWAY & GORRILL,
VINCENT CULLINAN,

Attorneys for Appellant.

No. 15,216

IN THE

United States Court of Appeals
For the Ninth Circuit

HUNT FOODS, INC., a Corporation,
Appellant,

VS.

WELLINGTON PHILLIPS and
H. W. LIHOLM,
Appellees.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

CUSHING, CULLINAN, DUNIWAY & GORRILL,
VINCENT CULLINAN,

1 Montgomery Street, San Francisco 4, California,

*Attorneys for Appellant
and Petitioner.*

FILED

AUG 29 1957

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
1. The Equal Dignities Rule	1
2. Termination and Mutuality	8
3. Statute of Frauds	9
4. Damages	9

Table of Authorities Cited

Cases	Pages
Allen v. Gardiner (1954), 272 Pac. (2d) 99	9
Anderson v. Standard Lumber Co., 64 Cal. App. 410, 1 Pac. 495	5
Austin v. Roberts, 20 Pac. (2d) 97	9
Berkey v. Halm, 224 Pac. (2d) 885	7
Cigretti v. Amer. Trust Co. (1956), 294 P. (2d) 490	4
Credit Bureau of San Diego v. Beach (1956), 144 Cal. App. (2d) 439, 301 Pac. (2d) 87	4
E. K. Wood Lumber Company v. Moore Well and Lumber Co., 97 Fed. (2d) 402	5
Ford Motor Company v. Kirkmyer Motor Company, 65 Fed. (2d) 1001	8
Georgia Peanut Co. v. Famo Products Co. (9th Circuit), 96 F. (2d) 440	7
J. A. Folger & Co. v. Williams (1954), 129 Cal. App. (2d) 24, 276 Pac. (2d) 645	8
Jeppi v. Brockman Holding Co. (1949), 34 Cal. (2d) 11....	7
Lathrop v. Gough (1954), 127 Cal. App. (2d) 754, 274 Pac. (2d) 730	7
Le Blond v. Wolfe (1948), 188 Pac. (2d) 278	7
Lewis-Hale Co. v. Enterprise Fuel Company (4th Cir.), 33 Fed. (2d) 727	10
Monarco v. Lo Greco, (1950), 35 Cal. (2d) 621, 220 Pac. (2d) 737	4, 5, 6, 7
Scott v. Cline Electric Manufacturing Co., 104 Cal. App. 123, 285 Pac. 349	8
Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88	6

Codes

Civil Code, Section 2309	2, 3, 4, 7
--------------------------------	------------

Texts

2 Cal. Jur. (2d) p. 700	6
2 Cal. Jur. (2d) p. 728	2, 7
2 Cal. Jur. (2d) p. 730	4

No. 15,216

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HUNT FOODS, INC., a Corporation,	}	<i>Appellant,</i>
vs.		
WELLINGTON PHILLIPS and		
H. W. LIHOLM,		<i>Appellees.</i>

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

*To the United States Court of Appeal for the Ninth
Circuit, Honorable A. L. Stephens, Chief Judge,
William Healy and W. L. Pope, Judges thereof:*

Appellant respectfully petitions for a rehearing in the matter of this appeal. Judgment of this Court affirming judgment in favor of appellees, was filed on August 7, 1957.

1. THE EQUAL DIGNITIES RULE.

The opinion, on this point, would reverse this Court's own prior decision, and would completely change the law of California with respect to the

application of Civil Code, Section 2309, generally known as "The Equal Dignities Rule".

This section provides in part:

"... an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

There are two exceptions: (1) where the agent signs at the direction of and in the presence of the principal and (2) where the agent is an *executive* officer of a corporation (2 *Cal. Jur.* (2d) 728).

To warrant an estoppel against reliance on this section, there must be proof that the corporation, *knowing of the alleged contract*, affirmatively did something that would estop it from denying the authority of its employee to enter into that contract. There is no proof that appellant (other than its employee Flynn) ever knew of a contract with appellees such as that found by the Court. The evidence, in fact, shows that no executive officer ever knew that Phillips was operating under the contract found here (Tr. pp. 141 and 424, 445 and 446). Appellee Phillips admits that the contract was "unique" for appellant (Tr. p. 446) and in appellee's brief, at page 7, it is admitted that Hunt never had a similar contract.

The Court here announces an astonishing rule. It finds that appellees would suffer unconscionable injury as a result of reliance on the *agents'* promise, and and therefore (the Court says) appellant corporation is estopped from raising a defense that appellees did not and could not prove that any executive officer of

appellant knew of the admittedly "unique" contract. If this be the law, a corporation can never deny the authority of an employee so long as an employee made promises to another on which the other relied and suffered detriment i.e. the fact that a plaintiff has suffered injury is enough without more, to raise an estoppel, even though the employee acted beyond his authority and without knowledge of the employer. How, then, is an employer to protect itself against a secret contract negotiated by an employee beyond his authority?

This decision would emasculate California Code, Section 2309 by creating an automatic estoppel against reliance on the section, if the plaintiff suffers injury sufficient to raise an estoppel against the Statute of Frauds. This would make unimportant the fact that appellees' injury resulted from reliance on an unauthorized promise of an employee, a promise beyond the employee's authority and unknown to the employer.

This Court merges the Code section with the Statute of Frauds; but the two laws are separate and distinct enactments, albeit related. The Statute of Frauds is concerned with proof of a contract which is known to both parties. Civil Code, Section 2309 deals with the authority of an agent to bind his employer; it protects an employer against unauthorized contracts in the absence of some misleading action by the employer. It does not follow therefore that the same facts creating an estoppel as to the one will create an estoppel as to the other. *It will be noted that there*

is absolutely no mention in the opinion of any facts to warrant estoppel to raise the Equal Dignities Rule.

The opinion fails to discuss the crucial question: What was done by the appellant corporation, through its executive officers, to estop it from raising the issue of authority?

The Court states that *Monarco v. Lo Greco* (1950), 35 Cal. (2d) 621, 220 Pac. (2d) 737 "appears" to have liberalized the requirements for a finding of estoppel to assert the Statute of Frauds and thereby concomitantly liberalized the requirements with respect to the Equal Dignities Rule.

The Court does not point to what, under a "liberalized" rule or otherwise, justifies the estoppel here as to the Equal Dignities Rule. It will be noted that since the *Monarco* case (which did not involve agency) the California authorities have not mentioned any "liberalized" rules as to Section 2309. In 1956, *six years after* the *Monarco* decision, the California Court still required proof of an affirmative act by the principal by which the third party is led to believe in the authority of the agent (Cf: *Cigretti v. Amer. Trust Co.*, (California 1956), 294 P. (2d) 490. In Volume 2, *Cal. Jur.* (2d) p. 730, which was published *two years after* the *Monarco* case, it is said:

"... but the estoppel will arise only where the other party to the contract is prejudiced by *reliance on some affirmative act of the principal.*"

Further support for the fact that the *Monarco* case did not change or liberalize the law in respect to Civil Code 2309 is found in *Credit Bureau of San Diego v.*

Beach (September 1956), 144 Cal. App. (2d) 439 at 444, 301 Pac. (2d) 87. This case, *decided six years subsequent* to the *Monarco* case, involved a question of ostensible agency but the rules respecting that question are similar to those on estoppel. The Court said:

“It is a general rule of law that where a third person relies upon an ostensible agency, he must give evidence of similar transactions in which the act of the agent was authorized or recognized.”

Not only does the Court in the instant case create new law for California but it reverses its decision in *E. K. Wood Lumber Company v. Moore Well and Lumber Co.*, 97 Fed. (2d) 402 at 409, where, in a similar case, the Court said:

“... There is no testimony in the record before us from which it may be inferred that Carl R. Moore was an officer of appellee corporation,”

and

“... In this case there is no evidence from which it could be inferred that appellee represented either that its agent had written authority or that it would not avail itself of the defense of the Statute.”

and, further,

“Appellee could in no way be estopped to assert the defense of California Civil Code, Sec. 2309, *unless it represented that its agent was authorized to enter into contracts required to be in writing.*” (Emphasis added).

See also:

Anderson v. Standard Lumber Co., 64 Cal. App. 410, 1 Pac. 495.

The California Supreme Court in *Seymour v. Oelrichs*, 156 Cal. 782 at 788, 106 Pac. 88 p. 92 held that knowledge by a principal of *some* contract with the other party does not justify any inference of ratification of or notice of a contract required to be in writing.

There is no issue of ostensible authority because, to rely on such authority, appellees must produce evidence of similar transactions in which the act of the agent was authorized or recognized. Appellees must show at least one specific instance in which a similar act of the agent was authorized, (2 *Cal. Jur.* (2d) p. 700). Here as noted above, the particular contract was "unique" for Hunt Foods who have never previously entered into such a contract.

We respectfully submit that the *Monarco* case did not liberalize rules but summarized the long standing California rules. Actually the Court in that case analyzed prior decisions and held that it is not necessary, in order to raise an estoppel against the Statute of Frauds, to show that, in addition to unconscionable injury or unjust enrichment, the defendant had also represented that no writing was necessary or represented that the Statute would not be relied upon as a defense. In that case there was no question of the stepfather's knowledge of his unjust enrichment (\$96,000) at the expense of the stepson's 30 years of work without pay on the stepfather's ranch. The stepfather deliberately defrauded the boy. It was a clear case for estoppel. In the *Monarco* case, and in the cases therein cited, both parties knew the contract

existed and therefore the *Monarco* case is not any authority that estoppel may arise, even when there is no proof that the defendant knew of the contract.

The *Monarco* case had nothing to do with agency questions and therefore it cannot be said, as the Court does here, that it “appears to modify” the holding of this Court in *Georgia Peanut Co. v. Famo Products Co.* (9th Circuit), 96 F. (2d) 440.

We respectfully submit that the cases cited in the opinion are not in point. *Berkey v. Halm*, 224 Pac. (2d) 885 did not involve agency. The plaintiff there, in reliance on the promise of the defendant, ceased all other work and gave all his business accounts to the defendant, who deliberately defrauded him.

In *Le Blond v. Wolfe* (1948), 188 Pac. (2d) 278, the agent signed the disputed contract at the specific direction of and in the presence of the principal. This is one of the two exceptions to the rule requiring proof of authority (2 Cal. Jur. (2d) 728) because it is, in law, the act of the principal (see *Lathrop v. Gough* (1954), 127 Cal. App. (2d) 754 at 764, 274 Pac. (2d) 730).

In *Jeppi v. Brockman Holding Co.* (1949), 34 Cal. (2d) 11, the president of the corporation (an executive officer, of course) with the authorization of the board of directors signed the disputed agreement. Thus, there are two clear distinctions: *First*, there was actual authority given the president by the board of directors all of whom had knowledge of the corporation and *second*, the contract was made by an executive officer, in which case Civil Code 2309 does not

apply under one of the above-mentioned established exceptions.

It is difficult to understand how any of these cases may be pertinent here. They don't involve questions of authority and clearly concern contracts of the principal rather than a question of the power of an employee to bind an innocent and uninformed employer to a forbidden contract.

2. TERMINATION AND MUTUALITY.

On the mutuality issue, this Court says that appellees could be required to buy appellant's goods because appellees were obliged to use their best efforts in the sale of goods but the California Court has specifically held that a promise to push the sale of products is not an enforceable consideration. See *Scott v. Cline Electric Manufacturing Co.*, 104 Cal. App. 123 at 126, 285 Pac. 349 at 351.

J. A. Folger & Co. v. Williams (1954), 129 Cal. App. (2d) 24, 276 Pac. (2d) 645 holds that an agreement to tender "as many of its shipments as in general business and market conditions will warrant" furnishes no consideration and lacks mutuality.

Comment on: *Ford Motor Company v. Kirkmyer Motor Company*, 65 Fed. (2d) 1001: We respectfully submit that this case is *not* cited out of context. It is true the Court there analyzed an earlier written contract which permitted termination at will and the Court discussed other features, but the Court ex-

pressly states that its decision is *not* based on those matters but on the ground that the oral contract, in so far as it relates to the sale of defendant's products to plaintiff, is lacking in mutuality. It was the oral contract (which was not expressly terminable at will) that lacked mutuality.

3. STATUTE OF FRAUDS.

On this subject, the Court finds that "if the contract is not enforced, an unconscionable injury will result." But the record is clear that at the time of termination appellees had no resources which would enable them to continue to perform. If the contract were not terminated appellees would, nevertheless, have been unable to perform. They had no capital (Transcript, p. 144) and no credit resources (Transcript, pp. 390 to 393) at the time of termination. It is stipulated in appellee's brief (p. 10, lines 8-11) that appellant did not cause the inadequacy of appellee's credit resources, so their plight was not due to appellant. Estoppel, of course, implies some causation.

4. DAMAGES.

Prospective damages like any other type of damages must be proved by the best available proof and the burden is on plaintiffs (*Allen v. Gardiner* (1954), 272 Pac. (2d) 99); (*Austin v. Roberts*, 20 Pac. (2d) 97 at 99). Appellees did not prove the gross sales for the period of operation to *any* of the 16 commissaries.

They introduced evidence of particular months, carefully selected because in other months the sales were "spotty" and then guessed from that as to the business they actually did during the 16 months. The opinion of appellee Phillips as to what sales he actually made or could have made, has no probative force. *Lewis-Hale Co. v. Enterprise Fuel Company* (4th Cir.), 33 Fed. (2d) 727 at 730.

As to whether gross profits alone were used as a basis for judgment, this Court states that the appellees' income tax return for the year 1952 shows some \$6,000.00 in expenses. The Court overlooks the fact that during that year, the appellees did over a quarter of a million dollars in their bidding business for others and they had increased their brokerage business by some forty per cent. There is no evidence in the tax return or otherwise as to what expenses were attributable to the Hunt business. The income tax return does not apportion expense as to this business. This Court would *assume* the amount of appellees' expense after stating the rule that net profits must be shown.

Dated, San Francisco, California,
August 29, 1957.

CUSHING, CULLINAN, DUNIWAY & GORRILL,
By VINCENT CULLINAN,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF MERIT

I, Vincent Cullinan, one of the attorneys for appellant, certify that I have personally handled the trial and appeal in this matter and that in my judgment the foregoing petition for a rehearing is well founded. I further certify that said petition is not interposed for delay.

Dated, San Francisco, California,
August 29, 1957.

VINCENT CULLINAN.

No. 15218

United States
Court of Appeals
for the Ninth Circuit

MARION B. FOLSOM, Secretary of the Department of Health, Education and Welfare,
Appellant,

vs.

GRETTA N. PEARSALL,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

NOV 10 1956

No. 15218

United States
Court of Appeals
for the Ninth Circuit

MARION B. FOLSOM, Secretary of the Department of Health, Education and Welfare,

Appellant,

vs.

GRETTA N. PEARSALL,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	9
Certificate of Clerk	36
Complaint	4
Counsel, Names and Addresses of	1
Excerpt From Docket Entries	3
Memorandum Opinion	17
Memorandum Opinion, Supplemental	30
Motion for Summary Judgment, Defendant's	14
Notice of	13
Motion for Summary Judgment, Plaintiffs ...	15
Notice of	15
Notice of Appeal	35
Notice of Motion for Reconsideration	27
Statement of Points on Appeal, Appellant's ..	37
Stipulation and Order Filed August 13, 1956 ..	39
Summary Judgment	34



NAMES AND ADDRESSES OF COUNSEL

LLOYD H. BURKE,

United States Attorney;

WILLIAM B. SPOHN,

Assistant United States Attorney,

Post Office Building,

San Francisco, California,

Counsel for Appellant.

CHALMERS SMITH,

85 West Santa Clara Street,

San Jose, California,

Counsel for Appellee.

EXCERPT FROM DOCKET ENTRIES

1955

Aug. 16—Filed complaint—issued summons.

Oct. 17—Filed answer of defendant.

Dec. 9—Filed notice by deft. of motion for summary judgment, Dec. 19, 1955, with supporting memo.

Dec. 29—Filed notice by plaintiff of motion for summary judgment, Jan. 16, 1956.

1956

Jan. 23—Ordered after hearing, motion for summary judgment submitted (Roche).

Feb. 10.—Filed memo. opinion of Court (Judgment for Plaintiff).

Mar. 8—Filed notice by deft. of motion for reconsideration of memo. opinion on March 19, 1956, with memo. support.

Mar. 19—Ordered after hearing, motion to reconsider submitted (Roche).

Mar. 26—Filed suppl. memo. opinion of Court (Judgment deft. affirmed) (Roche).

Apr. 27—Filed summary judgment—motion of deft. for summary judgment denied; decision of Social Security Administrator reversed and proceedings remanded to Dept. of Health, Education and Welfare for further proceedings in conformity with this decision (Roche).

June 22—Filed notice of appeal by deft.

July 26—Filed appellant's designation of record on appeal.

In the United States District Court, for the
Northern District of California, Southern Division

No. 34839

GRETTA N. PEARSALL,

Plaintiff,

vs.

MARION B. FOLSOM, Secretary of the Depart-
ment of Health, Education and Welfare,
Defendant.

COMPLAINT FOR REVIEW OF DECISION
OF SOCIAL SECURITY ADMINISTRA-
TION

Plaintiff complains of the Defendant and for
cause of action alleges:

I.

This action is brought under the provisions of
Sections 202 to 209, both inclusive, of the Social Se-
curity Act, as amended (U.S.C.A., Title 42, Sec-
tions 402 to 409, both inclusive), and particularly
Section 405g of the Social Security Act (U.S.C.A.,
Title 42, Section 405g).

II.

That plaintiff is now a resident of the County of
Santa Clara, State of California, and of the South-
ern Division of the Northern District of California.

III.

That at all times herein mentioned, the Federal

Security Agency and the Department of Health, Education and Welfare were or now are agencies of the United States of America; that defendant Marion B. Folsom is now the duly appointed, qualified and acting director of the said Department of Health, Education and Welfare, and that the Social Security Administration is now a division of said Department charged with the duty of administering the Social Security Act.

IV.

That plaintiff is the widow of Delbert L. Pearsall, Social Security Account Number 554-07-4368, who died on October 25, 1952; that plaintiff married said Delbert L. Pearsall on the 19th day of May, 1928, and was living with and supported by said Delbert L. Pearsall during the twenty-four (24) years immediately preceding his death.

V.

That plaintiff is not entitled to widow's insurance benefits or old age insurance benefits under the Social Security Act as she was then and still is under the age of sixty-five (65).

VI.

That a daughter, Sandra Grace Pearsall, was born, the issue of said marriage.

VII.

That said Delbert L. Pearsall was a fully insured wage-earner under the Social Security Act and was

entitled to maximum benefits under said Act on the basis of said Delbert L. Pearsall's wages and self-employment income.

VIII.

That on the 10th day of November, 1952, plaintiff filed her application for mother's insurance benefits and an application for child's insurance benefits for said Sandra Grace Pearsall with the Social Security Administration; that plaintiff at that time had, and still does have in her care her said child, Sandra Grace Pearsall; that plaintiff's application for mother's insurance benefits for herself, and child's insurance benefits for her daughter were allowed by the Social Security Administration and payments by the Administration to plaintiff and said daughter were commenced in the month of October, 1952; that said Sandra Grace Pearsall ever since has been, and is now receiving maximum child's insurance benefits.

IX.

That plaintiff received such benefits until the month of June, 1954, when she advised the Social Security Administration that she had become married to one Frank Richard, on or about the 24th day of June, 1954; that payments to plaintiff by the Social Security Administration were discontinued as of June, 1954.

X.

That on the 19th day of November, 1954, plaintiff filed a Complaint for Annulment of said marriage

against Frank Richard in the Superior Court of the State of California, in and for the County of Santa Clara; that the said complaint for annulment was based on the grounds that the marriage was voidable in that the Defendant had fraudulently induced the plaintiff to enter into said marriage; that on the 9th day of December, 1954, said Court made and issued its Decree of Annulment of said marriage, the decree reciting amongst other things as follows: "Now, therefore, it is ordered, adjudged and decreed that Plaintiff is entitled to an annulment; and that the marriage between the said Plaintiff Gretta Richard and the said Defendant Frank Richard, be and the same is hereby declared wholly null and void from the begininng * * *"

XI.

That thereafter the plaintiff filed her claim for reinstatement of mother's insurance benefits due her under the Social Security Act effective with the month of June, 1954, and was denied such benefits by the Bureau of Old-Age and Survivors Insurance; that plaintiff filed a request for a hearing before a Referee of the Social Security Administration; that such hearing was held on June 9th, 1955, and said Referee denied her said benefits, whereupon plaintiff filed a Request for Review of Referee's Decision with the Appeals Council of the Social Security Administration at Washington, D. C., which Council on July 1, 1955, denied the said Request for Review, with sixty (60) days allowed in which to file civil action in the District Court of the United States

for review of the matter; that this action is begun within the said time limit.

Wherefore, plaintiff prays that this Court review the proceedings, findings, and decision of the said Social Security Administration in this matter and enter herein upon the pleadings and transcript of the records its judgment reversing or modifying the decision of the Administration and its Administrator, the defendant herein, so as to grant to the plaintiff reinstatement of her mother's insurance benefits retroactive to the month of January, 1955, and for the continuance of said benefits which plaintiff is entitled under the terms of the Social Security Act, as amended, and that plaintiff may have such other and further relief in the premises as equity and this Court shall deem appropriate.

MALOVOS, MAGER,
NEWCOMER & CHASUK,

By /s/ CHALMERS SMITH,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed August 16, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR REVIEW

The Defendant, by the undersigned attorneys in his behalf, hereby answers the complaint in this cause as follows:

I.

Defendant denies the allegations in paragraph I of the complaint, except that he admits that this action is brought under the provisions of Section 205(g) of the Social Security Act, as amended (42 U.S.C.A. 405(g)), but Defendant denies that the Court has any jurisdiction in "equity" in this action, or any jurisdiction to grant to the Plaintiff reinstatement of mother's insurance benefits or to order the continuance of said benefits, as prayed for in the complaint.

II.

Defendant admits the allegations in paragraphs II, V, and VI of the complaint.

III.

Defendant admits the allegations in paragraph III of the complaint, except that he denies the allegations with respect to the Federal Security Agency, which was abolished by Reorganization Plan No. 1 of 1953 (18 F.R. 2053, 67 Stat. 631, 5 U.S.C.A. 623 fn.), and also except that defendant denies the allegation that he is the "acting director" of the Department of Health, Education, and Welfare. Defendant is the Secretary of said Depart-

ment, his correct official title being Secretary of Health, Education, and Welfare.

IV.

Defendant admits the allegations in paragraph IV of the complaint, except that he denies the allegation that the Plaintiff is the widow of Delbert L. Pearsall.

V.

Defendant denies the allegations in paragraph VII of the complaint, except that he admits the allegation that said Delbert L. Pearsall was a fully insured wage earner under the Social Security Act. Defendant states that said Delbert L. Pearsall died before attaining the minimum age necessary for entitlement to old-age insurance benefits under said Act.

VI.

Defendant admits the allegations in paragraph VIII of the complaint, except that he is without knowledge or information sufficient to form a belief as to the truth of the allegation that the Plaintiff "still does have in her care her said child, Sandra Grace Pearsall."

VII.

Defendant denies the allegations in paragraph IX of the complaint, except that he admits that Plaintiff received such benefits until, by letter dated July 1, 1954, she advised the Social Security Administration that she had married Frank Richard on June 25, 1954. Defendant also admits that pay-

ments to Plaintiff of mother's insurance benefits were discontinued as of June, 1954.

VIII.

Defendant denies the allegations in paragraph X of the complaint, except that he admits that on the 19th day of November, 1954, Plaintiff filed a complaint against Frank Richard in the Superior Court of the State of California, in and for the County of Santa Clara, in which complaint she prayed for annulment of her marriage to Frank Richard, or that "said marriage be dissolved by an interlocutory judgment of divorce." Defendant also admits that said complaint, insofar as what purports therein to be Plaintiff's first cause of action, was based on the grounds that the marriage was voidable in that Frank Richards had fraudulently represented to the Plaintiff that he intended to consummate said marriage, and that Plaintiff allegedly "entered into said marriage contract solely relying on said representation * * *." Defendant also admits the allegation that on the 9th day of December, 1954, said court made and issued its Decree of Annulment of said marriage, the decree reciting amongst other things as follows: "Now, therefore, it is ordered, adjudged and decreed that Plaintiff is entitled to an annulment; and that the marriage between the said Plaintiff Gretta Richard and the said Defendant Frank Richard, be and the same is hereby declared wholly null and void from the beginning * * *."

IX.

Defendant admits the allegations in paragraph XI of the complaint, except that he denies the allegation that mother's insurance benefits are due the Plaintiff.

X.

In accordance with the provisions of Section 205(g) of the Social Security Act, as amended, *supra*, Defendant files herein as part of this answer a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.

XI.

The Defendant asserts that the findings of fact of the Secretary of Health, Education, and Welfare are supported by substantial evidence and are conclusive.

XII.

The Defendant further asserts that the plaintiff has no claim upon which relief can be granted, as is shown by the provisions of the Social Security Act, as amended; the regulations of the Social Security Administration promulgated thereunder; the transcript of the record upon which the decision complained of was made; and the findings and conclusions of the Secretary of Health, Education, and Welfare.

Wherefore, the Defendant prays for judgment dismissing the complaint with costs and disbursement, and for judgment in accordance with Section 205(g) of the Social Security Act, as amended,

supra, affirming the decision complained of; and for such other and further relief as the Court may deem appropriate in the premises.

LLOYD H. BURKE,

United States Attorney;

By /s/ WM. B. SPOHN,

Assistant United States Attorney; Attorneys for
Defendant.

Affidavit of mail attached.

[Endorsed]: Filed October 17, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT, REASONS AND AUTHORITIES

Notice of Motion

To the Plaintiff and her attorneys, Malovos, Mager, Newcomer & Chasuk, 85 West Santa Clara Street, San Jose, California:

Please Take Notice that the undersigned will make the following motion before the Master Calendar Judge of this Court in Room 244, Post Office Building, Seventh and Mission Streets, San Francisco, California, at 9:30 a.m. on the 19th day of December, 1955, or as soon thereafter as the matter may be heard.

Motion for Summary Judgment

The Defendant hereby moves the Court for summary judgment on his behalf and against the plaintiff in this cause, on the grounds that the decision of the Defendant's predecessor in office, which the petition seeks to have reviewed and reversed, is correct and supported by substantial evidence, and therefore conclusive under Section 205(g) of the Social Security Act here involved (42 USCA 405(g)), and that the Defendant is accordingly entitled to such judgment as a matter of law for the reasons and upon the authorities hereafter set forth.

Reasons and Authorities

This motion is based on Rule 56 of the Federal Rules of Civil Procedure and the following:

1. The present notice, reasons and authorities, and accompanying memorandum in support;
2. The Plaintiff's complaint for review;
3. The Defendant's answer to the complaint and transcript of record filed therewith.

On the basis of the foregoing, the Defendant requests the Court to render summary judgment in his behalf and against the plaintiff in this cause.

LLOYD H. BURKE,

United States Attorney;

By /s/ WILLIAM B. SPOHN,

Assistant United States Attorney; Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed December 9, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT, REASONS AND AUTHORITIES

Notice of Motion

To the Defendant and his attorneys, Lloyd H. Burke, United States Attorney; William B. Spohn, Assistant United States Attorney, 422 Post Office Building, Seventh and Mission Streets, San Francisco 1, California.

Please Take Notice that the undersigned will make the following motion before the Master Calendar Judge of this Court in Room 244, Post Office Building, Seventh and Mission Streets, San Francisco, California, at 9:30 a.m. on the 16th day of January, 1956, or as soon thereafter as the matter may be heard.

Motion for Summary Judgment

The Plaintiff hereby moves the Court for summary judgment on her behalf and against the defendant in this cause, on the grounds that the decision of the Defendant's predecessor in office, which the petition seeks to have reviewed and reversed, is incorrect as a matter of law and therefore not conclusive under Section 205(g) of the Social Security Act here involved (42 USCA 405(g)), and that the Plaintiff is accordingly entitled to such judgment as a matter of law for the reasons and upon the authorities hereafter set forth.

Reasons and Authorities

This motion is based on Rule 56 of the Federal Rules of Civil Procedure and the following:

1. The present notice, reasons and authorities, and accompanying memorandum in support;
2. The Plaintiff's complaint for review;
3. The Defendant's answer to the complaint and transcript of record filed therewith.

On the basis of the foregoing, the Plaintiff requests the Court to render summary judgment in her behalf and against the defendant in this cause.

MALOVOS, MAGER,
NEWCOMER & CHASUK,

By /s/ CHALMERS SMITH,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed December 29, 1955.

In the United States District Court for the Northern District of California, Southern Division

[Title of Cause.]

MALOVOS, MAGER, NEWCOMER & CHASUK,
Attorneys for Plaintiff.

LLOYD H. BURKE,
United States Attorney;

WILLIAM B. SPOHN,
Assistant United States Attorney;
Attorneys for Defendant.

MEMORANDUM OPINION

Roche, Chief Judge:

This action is brought under § 205 (g) of the Social Security Act, as amended (hereinafter referred to as the "Act"), 42 U.S.C.A. § 405 (g), which provides for judicial review of a "final decision of the Administrator." The decision in this case was rendered on June 13, 1955, and became final on June 30, 1955, when plaintiff's request for review was denied.

The question for decision in this case is as follows: When "mother's insurance benefits" are awarded to a claimant as the widow of wage earner, and such benefits are terminated by reason of her remarriage, is her right to benefits revived upon her procurement of an annulment of the remarriage, even though the remarriage was not void, but was voidable?

Section 202 (g) of the Act, 42 U.S.C.A. §402 (g) provides for mother's insurance benefits and reads in pertinent part as follows:

“(g) (1) The widow * * * of an individual who died a fully or currently insured individual after 1939, if such widow

“ * * *

“(A) has not remarried,

“ * * *

shall be entitled to a mother's insurance benefit for each month, beginning with the first month after August, 1950, in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: * * * she remarries * * *” (Emphasis added.)

The facts of this case are as follows:

In November, 1952, plaintiff applied for and was awarded mother's insurance benefits, effective October, 1952. On June 25, 1954, plaintiff married Frank Richard, informing the Social Security Administration by letter dated July 1, 1954. The marriage was entered into in California where both plaintiff and Mr. Richard resided. Payment of benefits was terminated effective June, 1954. Thereafter on November 19, 1954, the plaintiff filed a “Complaint for Annulment and/or Divorce” in the Superior Court of Santa Clara County, alleging as a first cause of action, that the defendant had fraudulently represented to the plaintiff that he intended to consummate said marriage, but in fact he never intended to, and did not consummate the

marriage; and alleging as a second cause of action, that said defendant had "inflicted on plaintiff a course of conduct resulting in mental cruelty." The prayer was for an annulment of the marriage or that "said marriage be dissolved by an interlocutory judgment of divorce." No answer was filed by the defendant. The court on December 9, 1954, made and issued its "Decree of Annulment," which decree among other things, recites as follows: "Now, therefore, it is ordered, adjudged and decreed that plaintiff is entitled to an annulment; and that the marriage between the said plaintiff Gretta Richard, and the said defendant Frank Richard, be and the same is hereby declared wholly null and void from the beginning; * * *."

Thereafter plaintiff requested that the Bureau reinstate mother's insurance benefits.

The defendant has been unable to cite any cases to the court directly holding that a voidable marriage, though annulled *ab initio*, is a remarriage within the meaning of the Act. The plaintiff, on the other hand, has cited cases dealing with the immediate problem, with the exception that Workmen's Compensation statutes are involved instead of the Act. *Eureka Block Coal Co. vs. Wells*, (1925) 83 Ind. App. 181, 147 N. E. 811; *Southern Pacific Co. vs. Industrial Commissioner*, (1939) 51 Ariz. 1, 91 P. 2d 700; *Southern Railway Co. vs. Baskette*, (1939) 175 Tenn. 253, 133 S. W. 2d 498; *First National Bank vs. North Dakota Workmen's Compensation Bureau*, (1955) 68 N. W. 2d 681.

The conclusion to be drawn from the above cases is stated in Eureka Block Coal Co., *supra*:

“Giving the provision referred to a broad and liberal construction, as we must, a marriage within the meaning of the statute is not a void or voidable marriage which may at once be annulled, but a valid and subsisting marriage.” (Emphasis added.)

The holding in First National Bank vs. North Dakota Workmen’s Comp. Bureau, *supra*, is particularly revealing as North Dakota and California have identical annulment statutes and California cases construing these statutes were held to be persuasive in North Dakota by the North Dakota Supreme Court. Quoted with approval in said case was the following language from the leading California case dealing with annulments of voidable marriages, McDonald vs. McDonald, 6 Cal. 2d 457, 461 P. 2d 163:

“A familiar analogy exists in the law of contracts. Thus a contract may be voidable and subject to rescission, because of some infirmity in its procurement, but, unless attacked by notice of rescission or by suit, will not be avoided, but will remain binding. Garcia vs. California Truck Co., 183 Cal. 767, 192 Pac. 708. So with voidable marriages. The parties may or may not exercise their legal right to have them annulled and if they do not exercise such right, the marriages are binding; but, when annulment is sought, it can be granted only if there was some element of invalidity in the contracting of the marriage. Thus, in Millar vs. Millar, 175 Cal. 796, 806, it is stated: ‘Strictly speaking, the word “divorce” means a dissolution

of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of marriage, no valid marriage ever existed. This is true even though the marriage be only voidable at the instance of the injured party, or, in the words used in *Estate of Gregorson*, 160 Cal. 21, 25, "capable of being annulled." And the decree of nullity in such a proceeding determines that no valid marriage ever existed * * *'' (Emphasis added.)

The defendant primarily relies for authority in support of its contention that the annulled voidable marriage is a remarriage within the Act on the case of *Hahn vs. Gray, Jr.*, (1953) 203 F. 2d 625. In this case the widow received a pension as the unremarried widow of a veteran. This pension was discontinued when, in 1947, she was remarried. Some time later a New York Court annulled the second marriage on the ground that it had been procured by fraud, and Mrs. Hahn thereupon applied for restoration of her pension, which application was denied by the administrator. This decision was affirmed by the District Court, which was then affirmed by the Court of Appeals.

The decision in this case is based entirely on a jurisdictional ground and that part of the decision dealing with the annulment question is entirely dicta. However, assuming for the purpose of argument that this part of the court's opinion states the law, the wording thereof differentiates the *Hahn* case from the instant one. The annulment in the

Hahn case was not an annulment *ab initio*, as were the annulments in this case and in the Workmen's Compensation cases cited as authority for plaintiff. Said the court in the Hahn case:

"The decree annulling Mrs. Hahn's second marriage, by its very terms, merely dissolved the marriage 'heretofore existing' between the parties; it did not purport to render the marriage void from its very inception. Moreover, that decree did not become effective until three months after it was handed down. The only possible conclusion is that Mrs. Hahn was legally remarried for some period of time; namely from the date of the ceremony until three months after the annulment decree."

It should also be noted that New York law allows a wife the right to support in an annulment action, whereas California, where the plaintiff in this action obtained her annulment, does not bestow such right. Support money cannot be given under the California law even to an innocent wife who has had her voidable marriage annulled. *Millar vs. Millar*, 175 C. 797, 167 P. 394.

The only other decision cited by the defendant based on somewhat similar facts to those in dispute here is the holding in *Gaines vs. Jacobsen*, (1954) 308 N. Y. 218, 124 N. E. 2d 290. In this case the New York Court of Appeals held that the annulment of a divorced wife's remarriage did not revive the obligation of her first husband under a separation agreement requiring annual payments for her support "until she shall remarry." In so holding the court overruled its own decision in *Sleicher*

vs. Sleicher, (1929) 251 N. Y. 366, 167 N. E. 501, and explained this result by saying:

“At the time of the Sleicher decision, it was impossible for a wife to obtain alimony or other support upon annulment of a marriage; it followed inexorably, from the theory that an annulled marriage never existed, that such a marriage created no subsequent duty of support. See *Jones vs. Brinsmade*, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A., N. S., 192. To have held otherwise than the court did in Sleicher would, therefore, have deprived the wife in that case of any source of support whatsoever. However, since that time, the legislature has enacted section 1140-a of the Civil Practice Act, which provides that:

“ ‘When an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires.’

“This new provision, respondent urges, by removing the primary and underlying motivation for the Sleicher decision, distinguishes that case from the one before us and justifies us in reaching a different conclusion. Appellant, on the other hand, contends that there is no basis for distinguishing Sleicher, and that it is dispositive of this appeal.

“While resolution of the dispute may not be easy, it is our opinion that the new enactment, after the date of the Sleicher decision, alters the situation before us so materially that it calls for a different result in this case.”

It can be seen that the statutory law of New York cited in the Gaines decision, and upon which said decision is based, is different from the California law. Further, the question of whether a wife can or cannot receive support after an annulment of her marriage has been given great significance by the New York Court.

As a further possible defense to plaintiff's claim defendant points out that the California annulment statute (Civil Code § 86) provides that: "a judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them," and maintains that since the Social Security Administration was neither a party to the plaintiff's annulment action, or a party claiming under either party to said action it should not be bound by such decree. In support of this contention defendant has cited the case of *Price vs. Price*, 75 P. 2d 655, 24 Cal. App. 2d 462. The principle enunciated by the statute cited above is simply that a judgment of annulment shall not be conclusive as against third parties. This is demonstrated by the *Price* case. In that case the court looked behind the judgment of annulment and declared that said judgment was granted by a local court for a cause not authorized by Civil Code § 82, and therefore a third party (her husband of the first marriage) was not bound by said decree. In the instant case, applying the law of California, and therefore looking behind the judgment of annulment, we find that the annulment was granted on one of the grounds set forth under Civil Code § 86,

and therefore does not warrant complaint on the part of defendant.

Defendant submits that whatever might be the effect of the annulment decree as to plaintiff's status for state law purposes, here the real question is as to her status in relation to the provisions for "mother's insurance benefits" under the Act, the applicable provisions of which in clear and unambiguous language, provide for the "ending" of such benefits "with the month preceding the first month in which * * * she remarries" (Sec. 702 (g) of the Act, 42 U.S.C.A. § 402 (g)). After reading all of the cases cited by counsel, and the sharp issues raised in their submitted briefs, it can be said that if as defendant states there be no ambiguity involved, at least "resolution of the dispute may not be easy." *Gaines vs. Jacobsen*, *supra*.

Aside from the case law, however, policy considerations regarding this question are in the favor of plaintiff. The defendant concedes in its brief that "mother's insurance benefits" and "widow's insurance benefits" are "designed to replace an economic loss (of support) usually sustained by a wife upon the death of her wage-earner husband." In the instant case plaintiff had a right before she remarried to receive mother's benefits for the rest of her life. She entered her remarriage in good faith, and if said marriage had been valid she would have given up all rights to such mother's benefits. Certainly it cannot be said that an imposition will be made upon the Social Security Fund to allow this plaintiff, who cannot be supported by her

second husband under the California law of annulment, to resume the position she held prior to this attempted remarriage. To otherwise penalize her would not seem to be in keeping with the liberal construction which has been accorded the Social Security Act. In this regard the court adopts the reasoning of the case of *Sleicher vs. Sleicher*, (1929) 167 N. E. 501, applying the doctrine of "relation" [back] or "recission from the beginning," that is, the annulment when decreed, puts an end to the marriage from the beginning. It is not dissolved as upon divorce. Certainly the plaintiff should not be allowed to claim against the fund for the period of the second marriage before its annulment, and she has not done so. In this connection, the doctrine of "relation" [back] is a fiction of law adopted * * * solely for the purposes of justice' " "and that is not * * * without limits, prescribed by policy and justice, * * * " *Gaines vs. Jacobsen*, 124 N. E. 2d 290.

In accord with the foregoing it is ordered that judgment be entered herein in favor of plaintiff in accordance with Sec. 205 (g) of the Social Security Act, and Rule 56 of the Federal Rules of Civil Procedure.

Dated: February 10, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge,
U. S. District Court.

[Endorsed]: Filed February 10, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR RECONSIDERATION; REASONS AND AUTHORITIES

Notice of Motion for Reconsideration

To the Plaintiff and her attorneys, Malovos, Mager, Newcomer & Chasuk, 85 West Santa Clara Street, San Jose, California:

Please Take Notice that the undersigned will move the Court in Room 338, Post Office Building, Seventh and Mission Streets, San Francisco, California, at 9:30 a.m. on the 19th day of March, 1956, or as soon thereafter as may be practicable, to reconsider its Memorandum Opinion of February 10, 1956, in this cause for the reasons and upon the authorities hereinafter specified.

Reasons and Authorities

Since receiving the Memorandum Opinion of the Court in this cause, our attention has been called to the recent decision of the Supreme Court of California in the case of Sefton vs. Sefton, 45 A.C. 895, 291 P.2d 439, which conflicts in certain important respects with such Memorandum Opinion. In fact, the decision in the Sefton case so strongly supports the position of the Defendant United States of America in the present case, that we believe the Court may wish to reconsider its Memorandum Opinion accordingly.

In the Sefton case, the Supreme Court of California held that where a wife had been granted a

divorce with alimony to continue until her remarriage, and thereafter married another man—which remarriage was later annulled—the wife’s voidable marriage was a “remarriage” within the provisions of California Civil Code, Section 139. That Section provides in pertinent part:

“Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment, or order for the support and maintenance of the other party shall terminate * * * upon the remarriage of the other party.”

The California court held therefore that the annulment decree did not revive the first husband’s obligation to pay alimony notwithstanding the fact that the annulment decreed the remarriage as “null and void.”

In the course of its decision, the California court discussed the decisions of the New York Court of Appeals in *Sleicher vs. Sleicher*, 251 N.Y. 356, 167 N.E. 501 (1929), and *Gaines vs. Jacobsen*, 308 N.Y. 218, 124 N.E. 2d 290 (1954), which this Court also considered in its Memorandum Opinion. Both of these cases had previously been cited by the Defendant United States of America in its memoranda supporting its motion for summary judgment, with particular reliance upon the decision in the *Gaines* case. This Court, however, considered the *Gaines* case to be so distinguishable as to leave the *Sleicher* case representing the New York law on the subject, and accordingly relied on the latter in the present case.

The Supreme Court of California held in the Sefton case (and in accordance with the contention made by the Defendant herein) that the decision by the New York Court of Appeals in the Gaines case had deprived the Sleicher case of any persuasive authority. The California court concluded its discussion of those cases with the following observation:

“It is obvious that the reasoning in the Gaines case has deprived the Sleicher case of any present persuasive authority.”

The opinion in the Sefton case also contains very helpful and illuminating statements by the California court concerning the doctrine or rule of “relation back” of a decree of annulment. The discussion of this doctrine or rule by the California court, including the case of McDonald vs. McDonald, 6 C.2d 457, 58 P.2d 163 (1936) upon which this Court relied in its Memorandum Opinion, also supports strongly the contentions of the Defendant herein that the annulment of the present Plaintiff’s voidable remarriage did not have the effect of reconstituting her as the unremarried widow of the deceased wage earner.

Since the decision in the Sefton case was not cited by either party herein, nor mentioned by this Court in its Memorandum Opinion, we respectfully move for reconsideration. We submit that on the basis thereof, this Court should decide in favor of the Defendant United States of America and against

the Plaintiff as prayed in the Defendant's motion for summary judgment herein.

LLOYD H. BURKE,
United States Attorney;

By /s/ WM. B. SPOHN,
Assistant United States Attorney; Attorneys for
Defendant.

Affidavit of mail attached.

[Endorsed]: Filed March 8, 1956.

[Title of District Court and Cause.]

MALOVOS, MAGER, NEWCOMER & CHASUK,
Attorneys for Plaintiff.

LLOYD H. BURKE,
United States Attorney;

WILLIAM B. SPOHN,
Assistant United States Attorney;
Attorneys for Defendant.

SUPPLEMENTAL MEMORANDUM OPINION

Roche, Chief Judge:

Defendant has moved for reconsideration of this court's memorandum opinion, filed on February 10, 1956, in which plaintiff was granted summary judg-

ment. In so moving, defendant has directed attention to the recent decision of *Sefton vs. Sefton*, 45 A.C. 895, 291 P. 2d 439, a case not heretofore cited either by plaintiff or defendant. In that case the Supreme Court of California has decided that a former husband's right to rely on the apparent "remarriage" of his divorced wife, is paramount to the general California rule as enunciated in the case of *McDonald vs. McDonald*, 6 Cal. 2d 457, 58 P. 2d 163, 104 A.L.R. 1290, which is, that an annulment "relates back" and erases a marriage and all its implications from the outset. The question now before the court, is what if any is the import of the *Sefton* decision. Does that decision control the issue in the instant case, namely, when is a widow to be considered as "remarried" within the provisions of Section 202(g) of the Social Security Act?

At the outset it should be preliminarily stated that the construction of the word "remarriage" has caused some difficulty. One need but read the reported cases to realize this fact. And as with the construction of many words, depending on whether one applies a liberal or strict construction, varying results have been reached.

In order to determine whether or not the *Sefton* case is controlling herein, one must analyze the reasoning of the California Supreme Court in arriving at its decision. The court stated that it feared that the first husband still living might be prejudiced, that he was entitled to rely upon his former wife's "apparent marital status" and thus be free to "recommit his assets previously chargeable to alimony

to other purposes." The court, after applying the test for determining whether the doctrine of "relation back" appertained,¹ concluded that it did not, because the law "look[s] less favorably upon the more active of two innocent parties when by reason of such activity a loss is sustained as the result of the misconduct of a stranger."

Immediately it is apparent that the rationale of the Sefton decision is that the innocent divorced husband had the right to rely on his wife's holding herself out as "remarried," as otherwise his rights might be prejudiced. In the court's view no such prejudice appears in the instant case, and for this reason the Sefton case is not in point. After all, plaintiff is an innocent party who will lose rights she otherwise would have enjoyed except for a third party's misconduct. An exception should not be made to the California rule of "relation back" so as to deprive an innocent plaintiff of Social Security benefits at least where, as here, it is clear that defendant has not been prejudiced. Plaintiff's benefits did not arise because of divorce but because of the death of her husband, Delbert Pearsall. The payments which he made into the Social Security Fund were completed at his death and in no way can be increased. Defendant has stood ready under

¹"The test for determining the applicability of the doctrine as applied to voidable marriages is whether it effects a result which conforms to the sanctions of sound policy and justice as between the immediate parties thereto, their property rights acquired during that marriage and the rights of their offspring."

the Social Security Act to pay plaintiff the benefits she was entitled to as the mother of her first husband's child. Whatever funds were available for dispersal before plaintiff's attempted "remarriage" are still available. No California case has been cited to the court wherein the word "remarriage," appearing in a beneficent type statute, e.g., Workmen's Compensation, has been construed.

The courts of other jurisdictions, when considering the word "remarriage" as used in statutes similar to the liberally construed Social Security statutes, have reinstated benefits, and have not considered voidable marriages which have been annulled ab initio as "remarriages" within the meaning of the statutes construed. *Eureka Block Coal Co. vs. Wells*, (1925) 83 Ind. App. 181, 147 N.E. 811; *Southern Pacific Co. vs. Industrial Commissioner*, (1939) 51 Ariz. 1, 91 P. 2d 700; *Southern Railway Co. vs. Baskette*, (1939) 175 Tenn. 253, 133 S.W. 2d 498; *First National Bank vs. North Dakota Workmen's Compensation Bureau*, (1955) 68 N.W. 2d 681.

In accord with the foregoing, the court upon reconsideration of the issues in this case affirms the judgment.

Date: March 26th, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District
Court.

[Endorsed]: Filed March 26, 1956.

In the United States District Court for the
Northern District of California, Southern Division
No. 34839 Civil

GRETTA N. PEARSALL,

Plaintiff,

vs.

MARION B. FOLSOM, Secretary of the Depart-
ment of Health, Education and Welfare,
Defendant.

SUMMARY JUDGMENT

The above-entitled cause came on to be heard pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, on defendant's motion for summary judgment, filed December 9th, 1955, and plaintiff's motion for summary judgment, filed on or about the 29th day of December, 1955, and the cause having been presented, and the Court being fully advised, and the Court having entered its Order herein, denying the defendant's motion and granting the plaintiff's motion as a matter of law;

It Is Therefore Ordered, Adjudged and Decreed that upon the pleadings and transcript of the record, defendant's motion for summary judgment be, and the same is hereby denied; that plaintiff's motion for summary judgment be, and the same is hereby granted, the decision of the Social Security Administrator under review is reversed and the proceedings remanded (42 U.S.C. Sec. 405(g)) to the Department of Health, Education and Welfare for

further proceedings in conformity with this decision.

Dated this 27th day of April, 1956.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Approved as to form.

LLOYD H. BURKE,
United States Attorney;
By /s/ WILLIAM B. SPOHN,
Assistant U. S. Attorney.

[Endorsed]: Filed and entered April 27, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Defendant Marion B. Folsom hereby appeals to the United States Court of Appeals for the Ninth Circuit from the summary judgment entered in favor of the Plaintiff Gretta N. Pearsall on April 27, 1956, in this cause.

LLOYD H. BURKE,
United States Attorney;

By /s/ WILLIAM B. SPOHN,
Assistant United States Attorney; Attorneys for
Defendant.

Affidavit of mail attached.

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for appellant:

Excerpt from Docket Entries.

Complaint.

Answer.

Notice of Defendant for summary judgment.

Notice of Plaintiff for summary judgment.

Memorandum Opinion of Court.

Notice of Defendant for Reconsideration.

Supplemental Memorandum Opinion of Court.

Summary Judgment.

Notice of Appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 30th day of July, 1956.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15218. In the United States Court of Appeals for the Ninth Circuit. Transcript of Record. Marion B. Folsom, Secretary of the Department of Health, Education and Welfare, Appellant, vs. Gretta N. Pearsall, Appellee. On appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 31, 1956.

PAUL P. O'BRIEN,
Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 15218

MARION B. FOLSOM, Secretary of the Department of Health, Education and Welfare,
Appellant,

vs.

GRETta N. PEARSALL,

Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

The Appellant, by his undersigned attorneys, presents the following statement of points on which he intends to rely herein:

I.

The District Court erred in holding that the plaintiff had not “remarried” within the meaning of Section 202(g) of the Social Security Act, as amended (42 U.S.C.A. Section 402(g)).

II.

The District Court erred in holding that the plaintiff’s marriage to Frank Richard was not a “remarriage” within the meaning of said Section 202(g) of the Social Security Act, as amended.

III.

The District Court erred in holding that the plaintiff, who was the widow of Delbert L. Pearsall and who later remarried by marrying Frank Richard and thereafter obtained a decree of annulment in the Superior Court of the State of California, in and for the County of Santa Clara, was entitled to receive “mother’s insurance benefits” as the “unremarried widow” of Delbert L. Pearsall.

IV.

The District Court erred in holding that the plaintiff, who as the unremarried widow of Delbert L. Pearsall had applied for and was awarded “mother’s insurance benefits” under the aforesaid Section 202(g) of the Social Security Act, as amended, and whose benefits terminated upon her marriage to Frank Richard, was entitled to reinstatement of such benefits by reason of the decree of annulment of her marriage to Frank Richard which she ob-

tained as aforesaid in the Superior Court of the State of California, in and for the County of Santa Clara.

V.

The District Court erred in denying the defendant's motion for summary judgment, in granting the plaintiff's motion for summary judgment, and in reversing the decision of the defendant's predecessor in office, denying the plaintiff's application for reinstatement of the aforesaid benefits.

Dated: August 13, 1956.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney;

By /s/ WILLAM B. SPOHN,
Assistant United States Attorney; Attorneys for the
Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 13, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the undersigned attorneys for the respective parties that the certified copy of the administrative transcript which was filed as part of the Defendant's answer to the complaint for review in this cause may be

considered as an exhibit in its original form without printing.

LLOYD H. BURKE,

United States Attorney;

By /s/ WILLIAM B. SPOHN,

Assistant United States Attorney, Attorneys for
Appellant.

MALOVOS, MAGER,

NEWCOMER & CHASUK,

By /s/ CHALMERS SMITH,

Attorneys for Appellant.

[Endorsed]: Filed August 13, 1956.

No. 15,218

IN THE

United States Court of Appeals
For the Ninth Circuit

MARION B. FOLSOM, Secretary of the
Department of Health, Education,
and Welfare,

Appellant,

VS.

GRETTA N. PEARSALL,

Appellee.

On Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR THE APPELLANT.

LLOYD H. BURKE,

United States Attorney,

WILLIAM B. SPOHN,

Assistant United States Attorney.

Of Counsel:

ARTHUR C. MILLER,

ELIZABETH M. DOYLE,

Attorneys, Department of Health,
Education, and Welfare.

FILED

DEC 26 1956

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdictional statement	1
Question presented	2
Principal statutory provisions	3
Abstract of the case	4
Statement of points to be urged	6
Summary of argument	7
Argument	9
I. The term “remarriage” in Section 202(g) of the Social Security Act as amended is a Federal term and must be interpreted in the context of that act	9
A. Remarriage is a termination event and not a deduction event	9
B. The court below ignored language of Federal law and construed Federal term on basis of State law to achieve an illogical conclusion	15
II. The court below erred in its interpretation of State court decisions	20
III. The decision of the court below does prejudice to rights of defendant and of possible innocent third parties	25
IV. The decision below misapplies the principle of liberal construction of welfare legislation	31
Conclusion	34

Table of Authorities Cited

Cases	Pages
Dunphy v. Dunphy, 161 C. 87, 118 P. 445 (1911)	14
Eureka Block Coal Co. v. Wells, 83 Ind. App. 181, 147 N.E. 811 (1925)	19
Ewing v. Risher, 176 F.2d 641 (10th Cir. 1949)	31
First Nat'l Bank v. North Dakota Workmen's Comp. Bureau, N.D., 68 N.W. 2d 661 (1955)	19
Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E. 2d 290 (1954) .8, 20, 21	
Gregorson, Estate of, 160 C. 21, 116 P. 60 (1911)	14
Hahn v. Gray, 203 F.2d 625 (C.A.D.C. 1953)	17, 18
Hormel v. Helvering, 312 U.S. 552 (1941)	33
Jack Adelman, Inc. v. Sonners & Gordon, Inc., 112 F. Supp. 187, 189 (S.D. N.Y. 1934)	33
Keeney v. Keeney, 211 La. 585, 30 So.2d 549 (1947)	21
Livingstone v. Folsom, 234 F.2d 75 (3d Cir. 1956)	33
McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163 (1936) ...	14, 21
Moncrief v. Hobby, 133 F.Supp. 152 (D.Md. 1955), affd. sub nom. (4th Cir. 1956) Moncrief v. Folsom, 233 F.2d 471	31, 32
N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 120-132 (1944)	16, 17
Price v. Price, 24 C.A.2d 462, 75 P.2d 655 (1938)	26, 27
Sanders v. Altmeyer, 58 F.Supp. 67 (W.D. Tenn. 1944) ...	19
Sefton v. Sefton, 45 C.2d 872, 291 P.2d 439 (1955) .8, 21, 22, 23, 27	
Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929) ..	20, 21, 22
Social Security Board v. Warren, 142 F.2d 974 (8th Cir. 1944)	33
Southern Pacific Co. v. Industrial Commission et al., 51 Ariz. 1, 91 P.2d 700 (1939)	20
Southern Ry. Co. v. Baskette, 175 Tenn. 253, 133 S.W. 2d 498 (1939)	19
United States et al. v. LaLone et al., 152 F.2d 43 (1945) ...	32, 33
Walker v. Altmeyer et al., 137 F.2d 531 (2d Cir. 1943)	33

Statutes**Pages****Judicial Code:**

Section 1291 (28 U.S.C.A. 1291)	2
---------------------------------------	---

Social Security Act, as amended:

Section 201 (42 U.S.C.A. 401)	24
Section 202(a-i) (42 U.S.C.A. 402(a-i))	13
Section 202(d) (42 U.S.C.A. 402(d))	29
Section 202(e) (42 U.S.C.A. 402(e))	11
Section 202(g) (42 U.S.C.A. 402(g))	
..... 3, 4, 6, 7, 9, 11, 12, 15, 16, 17, 23, 30	
Section 203(a) (42 U.S.C.A. 403(a))	29
Section 203(b) (42 U.S.C.A. 403(b))	9, 10, 11, 15
Section 203(e) (42 U.S.C.A. (403(e))	10
Section 205(g) (42 U.S.C.A. 405(g))	1, 2, 5, 24, 25, 33
Section 216(c) (42 U.S.C.A. 416(c))	12
Section 216(h) (1) (42 U.S.C.A. 416(h) (1))	13, 14
Sections 201-219 (42 U.S.C.A. 401-419) (Title II of the Act)	4
Pub.L. No. 880, 84th Cong., 2d Sess., Sec. 101(a); 70 Stat. 807	29
Pub.L. No. 880, 84th Cong., 2d Sess., Sec. 113; 70 Stat. 831-832	11

California Civil Code, Section 86	25, 27
---	--------

Louisiana Civil Code, Art. 160	21
--------------------------------------	----

Miscellaneous

58 Am. Jur., Workmen's Compensation, Section 187	19
1 Armstrong, California Family Law, 41	14
104 A.L.R. 1290	14
16 Cal. Jur., Marriage, Section 922	14
H. Rep. 2936, 84th Cong., 2d Sess., p. 320	12
Sen. Rep. 2133, 84th Cong., 2d Sess., pp. 16-17	12

No. 15,218

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARION B. FOLSOM, Secretary of the
Department of Health, Education,
and Welfare,

Appellant,

VS.

GRETTA N. PEARSALL,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

BRIEF FOR THE APPELLANT.

JURISDICTIONAL STATEMENT.

This appeal arises from an action instituted by the appellee as plaintiff in the District Court for judicial review of a final decision of the appellant's predecessor in office under Section 205(g) of the Social Security Act as amended (42 U.S.C.A. 405(g)), hereinafter designated as the Act. The complaint for review is set forth at pages 4-8 of the transcript of record, hereinafter designated as R. —, and the de-

cision of the appellant's predecessor is set forth at pages 8-10 of the transcript of the administrative proceedings, which has been stipulated as an exhibit herein (R. 39-40) and is hereinafter designated as Adm. Tr. —. Following the answer to the complaint (R. 9-13), motions for summary judgment were filed by the respective parties (R. 13-17) and heard by the District Court, which later issued a memorandum opinion ordering judgment for the plaintiff (R. 17-26). The defendant moved for reconsideration (R. 27-30), was duly heard, and the District Court issued a supplemental memorandum opinion affirming judgment for the plaintiff (R. 30-33). The opinions of the District Court have since been reported at 138 F. Supp. 939 (1956). Summary judgment was accordingly entered, denying the defendant's motion, granting the plaintiff's motion, reversing the decision of the defendant's predecessor, and remanding the proceedings to the Department of Health, Education, and Welfare, pursuant to the said Section 205(g) of the Act (R. 34-35). A notice of appeal therefrom was timely filed by the defendant (R. 35). Jurisdiction of this Court to hear and determine the appeal is conferred by the aforesaid Section 205(g) of the Act as amended and 28 U.S.C.A. 1291.

QUESTION PRESENTED.

Whether the District Court erred in holding that the present appellee, whose mother's insurance benefits as the unremarried widow of a deceased wage

earner had been terminated by her remarriage in accordance with Section 202(g) of the Act (42 U.S.C.A. 402(g)), was entitled to reinstatement of those benefits upon the annulment of her remarriage on the ground that such was a voidable marriage.

PRINCIPAL STATUTORY PROVISIONS.

Section 202(g) of the Act, *supra*, provides for mother's insurance benefits in pertinent part as follows:

"The widow * * * of an individual who died a fully or currently insured individual after 1939, if such widow * * *

(A) has not remarried

* * *

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit * * *

shall be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and *ending with the month preceding the first month in which any of the following occurs*: no child of such deceased individual is entitled to a child's insurance benefit, such widow * * * becomes entitled to an old age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, *she remarries*, or she dies. * * *" (Italics ours.)

ABSTRACT OF THE CASE.

Title II of the Act (42 U.S.C.A. 401-419) provides a system of benefits for certain surviving dependents of deceased wage earners. Section 202(g) thereof, *supra*, provides in pertinent part that the widow of a deceased wage earner who has not remarried and who has in her care a child of the deceased wage earner is entitled to mother's insurance benefits beginning with the month in which she becomes so entitled and "ending with the month preceding the first month in which . . . she remarries . . ."

As of October, 1952, the appellee was awarded mother's insurance benefits as the unremarried widow of Delbert L. Pearsall, the deceased wage earner. Payment of such benefits was terminated as of the month of June, 1954, by reason of her marriage to one Frank Richard in that month in California, where both resided. Thereafter, on November 19, 1954, in the Superior Court of the State of California, in and for the County of Santa Clara, the appellee filed a "Complaint for Annulment and/or Divorce" against Richard (Adm. Tr. 25-28), alleging as a first cause of action that Richard had fraudulently represented to her that he intended to consummate the marriage but that in fact he never intended to and did not consummate the marriage (Adm. Tr. 25-26), and alleging as a second cause of action that Richard had inflicted on her a course of conduct resulting in mental cruelty (Adm. Tr. 26-27). The present appellee accordingly prayed for an annulment or, in the alternative, for an interlocutory decree of divorce. Upon default of said

Richard, the court on December 9, 1954 made and issued its decree of annulment (Adm. Tr. 30-31). The present appellee thereupon requested reinstatement of her mother's insurance benefits. The Bureau of Old-Age and Survivors Insurance, Social Security Administration, refused to reinstate such benefits and the present appellee thereupon secured a hearing before a referee of the Office of the Appeals Council (Adm. Tr. 15 et seq.). That hearing resulted in a decision that the present appellee was not entitled to reinstatement of mother's insurance benefits upon the annulment of her marriage to Richard (Adm. Tr. 8-10). She then requested a review of the referee's decision by the Appeals Council (Adm. Tr. 3), which was denied (Adm. Tr. 2). The decision thus became the final decision of the present appellant's predecessor.

As recited in the Jurisdictional Statement, *supra*, the present appellee next brought an action under Section 205(g) of the Act for judicial review of such decision in the District Court, which resulted in a reversal on the ground that upon termination by annulment of the present appellee's voidable marriage to Richard, she became entitled to reinstatement of mother's insurance benefits as of the date of the decree of annulment (R. 17-26; 30-33). This appeal followed.

STATEMENT OF POINTS TO BE URGED.

1. The District Court erred in holding that the present appellee had not "remarried" within the meaning of Section 202(g) of the Act, *supra*.

2. The District Court erred in holding that the present appellee's marriage to Frank Richard was not a "remarriage" within the meaning of said Section 202(g) of the Act.

3. The District Court erred in holding that the present appellee, who was the widow of Delbert L. Pearsall and who later remarried by marrying Frank Richard and thereafter obtained a decree of annulment in the Superior Court of the State of California, in and for the County of Santa Clara, was entitled to receive mother's insurance benefits as the "unremarried widow" of Delbert L. Pearsall.

4. The District Court erred in holding that the present appellee, who as the "unremarried widow" of Delbert L. Pearsall had applied for and was awarded mother's insurance benefits under the aforesaid Section 202(g) of the Act, and whose benefits terminated upon her marriage to Frank Richard, was entitled to reinstatement of such benefits by reason of the decree of annulment of her marriage to Frank Richard which she obtained as aforesaid in the Superior Court of the State of California, in and for the County of Santa Clara.

5. The District Court erred in denying the defendant's motion for summary judgment, in granting the plaintiff's motion for summary judgment, in reversing the decision of the defendant's predecessor,

and in remanding the proceedings to the Department of Health, Education, and Welfare.

SUMMARY OF ARGUMENT.

The word "remarries" in Section 202(g) of the Act, *supra*, is a term used in a Federal law, and its meaning must be interpreted in the context of that law. In this context, it is clear that remarriage of a widow receiving mother's insurance benefits is an event which terminates those benefits, and does not merely suspend them. The same Federal law provides that on the occurrence of certain other events deductions shall be imposed in the amount of the benefits—i.e., the benefits are suspended, but the Act specifically provides that on remarriage of the widow the benefits end.

While the validity of a marriage is determined by state law, the question of whether a voidable marriage constitutes a "remarriage" within the meaning of the Act is a question of Federal law. The court below failed to interpret the term "remarries" in the context of the Act and, on the basis of some state court decisions concerning the effect as between private parties of the annulment of a voidable marriage, reached a conclusion which is not only in error but rather illogical, in that it expressly recognizes that there was a "remarriage" (within the meaning of the Act) which existed until annulled, but holds that the "remarriage", once annulled, ceased to be a "remarriage" within the meaning of the Act and that

the annulment had the effect of reviving a right to benefits which had *ended* under the express provisions of the Act.

The District Court, in reaching its decision, misinterpreted the state court decisions upon which it relied, and particularly *Gaines v. Jacobsen*, 308 N.Y. 218, 124 N.E. 2d 290 (1954), and *Sefton v. Sefton*, 45 C. 2d 872, 291 P. 2d 439 (1955). These cases clearly hold that the annulment of a voidable marriage does not wipe such marriage off the record for all purposes.

The District Court's decision would result in inequities which the Act does not require. Under its decision, the effect of the annulment of a voidable marriage of a former beneficiary would vary from state to state, so that the former beneficiary's rights, and also the rights of other beneficiaries whose benefits are based on the same wage record, would depend on the fortuitous circumstance of identity of the state in which the annulment decree was secured. In the name of liberal construction, the District Court has misconstrued the Federal law, to the prejudice of the Social Security Trust Fund and other persons whose benefits depend on the same wage record, and has written into the Act a geographical diversity of rights of beneficiaries and former beneficiaries of the Federal law which neither Congressional policy nor language supports.

ARGUMENT.

I.

THE TERM "REMARRIAGE" IN SECTION 202(g) OF THE ACT IS A FEDERAL TERM AND MUST BE INTERPRETED IN THE CONTEXT OF THE ACT.

A. Remarriage is a termination event and not a deduction event.

Section 202(g), quoted in pertinent part above, provides that a mother's insurance benefits end with the month preceding the month in which any one of several events occur. For examples, if the child of the deceased wage earner dies or attains age 18, so that the child is no longer entitled to a child's insurance benefit, the mother's insurance benefits end; or if the widow becomes entitled to an old age benefit based on her own wage record, her entitlement to mother's insurance benefits ends. So too, when the mother remarries or dies, her entitlement to mother's insurance benefits ends. Since this is a case of first impression in the interpretation of such language of Section 202(g), appellant cannot cite the court to any precedent decisions. The language of the statute must be interpreted in the light of the over-all pattern of the Act and of its purpose. It is to be noted that Section 202(g) provides for the *ending* of mother's insurance benefits with the occurrence of the events specified in that section, and not for deductions from the mother's insurance benefits during the continuance of any of the events therein specified.

In contrast to the language of Section 202(g) is the language of Section 203(b) (42 U.S.C.A. 403(b)), which provides for *deductions* from benefits during

the months in which certain events occur. Section 203(b) provides that

“Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this title to which an individual is entitled, until the total of such deductions equals such individual’s benefit or benefits under Section 202 for any month—

(1) in which such individual is under the age of 72 and for which months he is charged with any earnings under the provisions of subsection (e) of this section;

* * *

(4) in which such individual, if a widow entitled to a mother’s insurance benefit, did not have in her care a child of her deceased husband entitled to a child’s insurance benefit;

* * *”

Under Section 203(b), benefits are suspended during those months in which the beneficiary is charged with earnings in excess of the amounts allowed under Section 203(e) (42 U.S.C.A. 403(e)) or in which the beneficiary, if a widow entitled to mother’s insurance benefits, does not have in her care a child of the deceased wage earner entitled to child’s insurance benefits. Thus, appellee would have suffered deductions from her benefits for any month or months in which she had excess earnings or in which she did not have in her care the child of the deceased wage earner. When earnings ceased or when she again had the child of the deceased wage earner in her care, her benefits

would have been reinstated as of the month when the deduction event no longer existed. The language of Section 203(b) clearly so provides.

We submit that the contrast between the language employed by Congress in Section 202(g) and in Section 203(b) is too striking to be ignored or explained away, and that the decision of the court below directing the reinstatement of appellee to mother's insurance benefits as of the month of the annulment of her marriage to Frank Richard is judicial legislation in that it adds to the Act a provision for reinstatement which Congress significantly omitted. It would have been a simple matter for Congress to provide that a widow entitled to mother's insurance benefits would suffer deductions from her benefits during any month or months in which she was married, or to have provided that deductions would be imposed in the event a widow entitled to mother's insurance benefits remarried but that such deductions would cease when such remarriage was terminated by death, divorce or annulment. Congress, however, clearly provided in Section 202(g) that the widow's entitlement to mother's insurance benefits *ends* with the month preceding the month in which she remarries, and no provision is made in Section 202(g) or elsewhere for reinstatement of such benefits upon the termination of the remarriage, regardless of the means by which the remarriage is terminated.

Noteworthy also is the 1956 amendment to Section 202(e) of the Act (Section 113, P. L. 880, 84th Cong., 2d Sess.; 70 Stat. 831-32). Section 202(e) provides for

benefits to the aged widow of the deceased wage earner, and like Section 202(g) provides that such benefits shall end with the month preceding the month in which the widow remarries. By the 1956 amendment, Congress added subparagraph (3) which provides that in the case of a widow who remarries and whose subsequent marriage is terminated by the death of her second husband, but she is not his widow as defined in Section 216(c), then the remarriage shall be deemed not to have occurred. The purpose of this amendment is to reinstate a widow's benefits which were terminated by reason of her remarriage where such remarriage ended within one year because of the husband's death. Sen. Rep. 2133, 84th Cong., 2d Sess. (1956), pages 16-17; H.R. Rep. 2936, 84th Cong., 2d Sess. (1956), page 32. This is the only provision in the Act for reinstatement of benefits after the occurrence of a termination event. It applies only to widow's benefits—not to mother's insurance benefits—and only where the remarriage is terminated by death.

Congress has therefore directed its attention to the specific matter of reinstatement of benefits terminated by remarriage of the beneficiary, and has directed reinstatement only in the case of the aged widow and only where the remarriage terminates by death within one year. The enactment of this one provision for reinstatement after termination of benefits is certainly significant in the present case, where appellee argues, and the court below held, that benefits are to be reinstated after termination, despite the absence of any statutory provision therefor.

We also direct the Court's attention to Section 216(h)(1) of the Act (42 U.S.C.A. 416(h)(1)), in which Congress has directed that in the determination of whether an applicant is the wife, husband, widow, widower, child or parent of a wage earner, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the state in which the wage earner was domiciled at the time of the application or at the time of death. It is significant that Section 216(h)(1) directs the application of domiciliary law only in determining the relationship of an *applicant* to the *wage earner*. Congress has not, therefore, directed the application of domiciliary law—in this case the law of California—to the determination of appellee's relationship to Frank Richard, in order to determine whether she is entitled to reinstatement to benefits as the widow of Delbert Pearsall, the deceased wage earner.¹

Since there is no Federal law of domestic relations, the usual rules of conflict of laws are applied in determining whether a marriage contracted by a beneficiary under the Act constitutes a valid, voidable, or void marriage. Thus the law of the jurisdiction in which the marriage is contracted determines its

¹Especially when read in its context, it is clear that the word "applicant" as used in Section 216(h)(1) of the Act (42 U.S.C.A. 416(h)(1)) refers only to an applicant for an original award of benefits under any of the several subsections of Section 202 of the Act (42 U.S.C.A. 402). This latter section provides in each of its subsections (a) through (i) for a different category of "old-age and survivors insurance benefits" for which an individual may file an "application".

validity. Whether the marriage whose validity is determined by state law constitutes a “remarriage” within the meaning of the Act is a matter of Federal law. Since a voidable marriage, unless and until it is annulled, has all the legal incidents of a valid marriage, we submit that it is such a “remarriage.” Its subsequent annulment terminates the remarriage, and even though in certain situations and for certain purposes the marriage is regarded under state law as though it had never occurred, there is no provision in the Act which compels or admits the conclusion that the incidents of the state court decree are incorporated in the Act. Congressional silence on this point, when contrasted with the directive of Section 216(h)(1), is clear indication to the contrary.

Under the law of California, where appellee married Frank Richard, a marriage induced by fraud is voidable only and is not void. 16 *Cal. Jur.*, Marriage, Section 922; 1 *Armstrong*, California Family Law, 41. Until the voidable marriage is annulled, it is a valid subsisting marriage under the law of California and has all the effects of a wholly valid marriage, except only that it is subject to annulment by the institution of appropriate legal proceedings by the injured party. *Estate of Gregorson*, 160 C. 21, 116 P. 60 (1911); *Dunphy v. Dunphy*, 161 C. 87, 118 P. 445 (1911); *McDonald v. McDonald*, 6 C. 2d 457, 58 P. 2d 163, 104 A.L.R. 1290 (1936). Therefore, had Frank Richard died before the dissolution of his marriage to appellee, and had appellee applied for benefits as his widow, she would have been entitled to such benefits if other conditions of entitlement had been met.

Appellee's marriage to Frank Richard therefore affected her status under the Act not only in that it terminated her benefits as the widow of Delbert Pear-sall, but also would, except for her action in securing the annulment, have given rise to rights under the Act as the wife or widow of Frank Richard.

There can be no doubt that in this case appellee did in fact contract a marriage with Frank Richard, which she later sought to have dissolved by divorce or annulment. The marriage was in fact annulled on the ground of fraud. Since appellee does not urge that she is entitled to reinstatement as of the date that her benefits were terminated, but only as of the date of the annulment of this marriage to Frank Richard, it seems that appellee herself admits that a remarriage occurred. If a remarriage did occur—and appellant submits that there can be no doubt that such is the case—then benefits can properly be reinstated only if there is provision in the Act authorizing such reinstatement. There is no language in the Act which authorizes such reinstatement, and on the contrary the very language that is employed in Sections 202(g) and 203(b) precludes any inference that such authorization was intended.

B. The court below ignored language of Federal law and construed a Federal term on basis of state law to achieve an illogical conclusion.

The court below discussed various decisions of state courts to the effect that a decree annulling a voidable marriage relates back to the date of the contracting of the marriage, and on the basis of these decisions held that appellee's marriage to Frank Rich-

ard, once annulled, was wiped out, so that the effect was the same as though the marriage had never occurred. Thus the court found that appellee had not remarried, insofar as the appellee's right to reinstatement of mother's insurance benefits *after* the date of the decree of annulment is concerned. Rather illogically (but correctly), the court below held that a marriage did exist until it was annulled, and that appellee was not entitled to mother's insurance benefits during that period. The court therefore held that state court decisions are to determine the meaning of the word "remarriage" in Section 202(g) of the Act.

Once it has been determined under applicable state law, that a voidable marriage has been contracted, the effect of the annulment of such marriage under the terms of the Act is a question of Federal, and not of state law. *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111, 120-132 (1944). If the effect of the annulment of a voidable marriage were to be determined by the rulings of state courts in cases concerning private rights or rights arising under state laws such as workmen's compensation acts, then the rights of former beneficiaries under the Act would vary from state to state depending on the law of the forum where the annulment proceedings were had, and this although the marriages involved were, in each case, under the law of the state where contracted merely voidable and not void. If the decision of the court below is followed, the Social Security Administration would have the extremely difficult task of having to determine in each case whether or not, in the state

where the former beneficiary's marriage is annulled, the annulment of a voidable marriage is deemed for other purposes to relate back to the date of the contracting of the marriage and of attempting to ascertain which of the situations involving private rights was most nearly analogous in principle to the situation involved in the case arising under Section 202(g). We accordingly submit that in the absence of specific Congressional mandate that beneficiaries of the Act in similar situations be differently treated, depending upon the provisions of different state laws, the Act should be applied with equal effect to all persons within its scope. *N.L.R.B. v. Hearst Publishing Co.*, supra.

In this connection, we would direct the Court's attention to the decision in *Hahn v. Gray*, 203 F. 2d 625 (C.A.D.C. 1953). The plaintiff therein had been receiving a pension as the unremarried widow of a veteran. When she remarried, the pension was discontinued pursuant to regulations of the Veterans' Administration. A New York court annulled the second marriage on the ground that it had been obtained by fraud and she then applied for restoration of the pension. The Administrator of Veterans' Affairs denied the application, and was affirmed by the Court of Appeals for the District of Columbia. We cited the *Hahn* case to the District Court in our motion for summary judgment herein, but the latter distinguished the opinion on the ground that it was based entirely on a jurisdictional point, and that the portion dealing with the annulment question was entirely dicta. 138 F. Supp. 939, at 941. Even if this portion were dicta, it should

be very persuasive as coming from a United States Court of Appeals. Actually, however, the portion concerning the decree of annulment is not dicta but is one of the grounds of the decision. The opinion in the *Hahn* case holds that a voidable marriage constitutes a remarriage, so that the plaintiff therein was no longer the unremarried widow of the veteran. We accordingly submit the *Hahn* decision as valid authority in the present situation.

Appellee does not contend that she did not marry Frank Richard, and in fact has recognized that a marriage did exist with Richard until it was annulled, as she has not sought reinstatement of benefits as of the date of the termination of the benefits but only as of the date as of the annulment of the marriage. In fact, appellee's counsel stated that "It is true that claimant's status did change upon her going through a second marriage ceremony" (Adm. Tr. 4), and that such marriage was not void but merely voidable (Adm. Tr. 18). It should be noted moreover, that in the same action in which appellee sought annulment of her voidable marriage, she asked in the alternative for a dissolution of that marriage by divorce. The court below agreed that appellee was married to Richard until the decree of annulment and stated that appellee should not be allowed to claim against the Social Security Trust Fund for the period of the second marriage before its annulment.

Thus we have a situation in which, in the face of the indisputable fact that appellee married Richard and for six months was his lawful wife, the court be-

low, on the basis of the fiction of "relation back" of the decree of annulment, nevertheless ruled that her marriage to Richard did not constitute a "remarriage" within the meaning of the Act.

The court below also relied on four state court decisions in workmen's compensation cases. These cases do not in fact support the decision below. In the first place, there is great variation in state workmen's compensation laws, and remarriage is ordinarily not a ground for termination. 58 *Am. Jur.*, Workmen's Compensation, Section 187. Secondly, the purpose of such laws is to shift from the public generally to the employer the burden of relieving the economic dependency caused by industrial accidents, and the interpretation of such laws has been rejected as a guide for the interpretation of the Act. *Sanders v. Altmeyer*, 58 F. Supp. 67 (W.D. Tenn. 1944). For example, the statute which was construed by the Indiana court in *Eureka Block Coal Co. v. Wells*, 83 Ind. App. 181, 147 N.E. 811 (1925), provided that the *dependency* of the widow terminated on her remarriage, and *Southern Ry. Co. v. Baskette*, 175 Tenn. 253, 133 S.W. 2d 498 (1939) was decided on the basis of the *Eureka Block Coal Co.* decision, without any discussion of the provisions of the Tennessee law. The decision in *First Nat'l Bank v. North Dakota Workmen's Comp. Bureau*, N. D., 68 N.W. 2d 661 (1955), clearly shows how irrelevant the decisions dealing with workmen's compensation laws are to the present case, for the North Dakota law specifically recognizes the reinstatement of widow's

benefits if her remarriage is annulled, if the action for annulment is filed within six months of the marriage. So, benefits of an incompetent dependent child were there reinstated when her marriage was annulled. The decision in *Southern Pacific Co. v. Industrial Commission et al.*, 51 Ariz. 1, 91 P. 2d 700 (1939), presents perhaps the most nearly analogous situation; but even there it must be recognized that the workmen's compensation law is designed to relieve the needs of the deceased wage earner's dependents. Dependency, rather than status, is determinative of the right to such benefits.

II.

THE COURT BELOW ERRED IN ITS INTERPRETATION OF STATE COURT DECISIONS.

In its memorandum opinion, the court below relied heavily on the case of *Sleicher v. Sleicher*, 251 N.Y. 366, 167 N.E. 501 (1929), and distinguished the later New York decision in *Gaines v. Jacobsen*, 308 N.Y. 218, 124 N.E. 2d 290 (1954), on the ground that the state law had meanwhile been amended to provide for the support of the wife in appropriate cases where a voidable marriage was annulled. In the *Sleicher* case, the New York Court of Appeals had held that where a divorced wife's remarriage was annulled, the first husband's obligation of providing alimony under a separation agreement and a foreign divorce decree until her remarriage was revived by the annulment as of the date of the annulment. The *Gaines* case, on the

contrary, held that the annulment of a divorced wife's remarriage did not revive, even prospectively, the obligation of her first husband under a separation agreement providing for payments for her support "until she shall remarry".² The court below reasoned that since there was no provision in California law for requiring the husband to support the wife after his voidable marriage to her was annulled, the earlier *Sleicher* case was still valid authority as to the effect to be given to the annulment of a voidable marriage in California. However, the opinion in the *Gaines* case shows clearly that the New York Court of Appeals expressly disapproved of the reasoning in the *Sleicher* case, even apart from the effect of the New York amendment which had subsequently been enacted. Moreover, in the *Sefton* case, *infra*, the Supreme Court of California discussed both the *Sleicher* case and the *Gaines* case and concluded its discussion thereof as follows:

"It is obvious that the reasoning in the *Gaines* case has deprived the *Sleicher* case of any present persuasive authority." (45 C. 2d at 878, 291 P. 2d at 443).

The court below relied also on language of the California Supreme Court in *McDonald v. McDonald*, 6

²Note that the remarriage in the *Gaines* case, which terminated the first husband's obligation to support, was bigamous and void. See also, *Keeney v. Keeney*, 211 La. 585, 30 So.2d 549 (1947), wherein a void marriage terminated the first husband's obligation to pay alimony under Louisiana Civil Code, Art. 160, which provides alimony shall be "revocable * * * in case the wife should contract a second marriage." *A fortiori* a voidable marriage, whether or not it is annulled, terminates the obligation to support or pay alimony.

C. 2d 457, 58 P. 2d 163 (1936), to the effect that a decree annulling a voidable marriage determines that no valid marriage ever existed.

Because of such reliance by the court below on the *Sleicher* and *McDonald* cases, the appellant moved for reconsideration on the basis of the more recent decision of the Supreme Court of California in *Sefton v. Sefton*, 45 C. 2d 872, 291 P. 2d 439 (1955). In our memorandum of reasons and authorities for the motion, we summarized the holding of the *Sefton* case as follows:

“In the *Sefton* case, the Supreme Court of California held that where a wife had been granted a divorce with alimony to continue until her remarriage, and thereafter married another man—which remarriage was later annulled—the wife’s voidable marriage was a ‘remarriage’ within the provisions of California Civil Code, Section 139. That section provides in pertinent part:

‘Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment, or order for the support and maintenance of the other party shall terminate * * * upon the remarriage of the other party.’

“The California court held therefore that the annulment decree did not revive the first husband’s obligation to pay alimony notwithstanding that the annulment decreed the remarriage as ‘null and void’.” (R. 27-28).

The court below, in its supplementary memorandum opinion (R. 31) observed:

“The question now before the court, is what if any is the import of the *Sefton* decision. Does

that decision control the issue in the instant case, namely, when is a widow to be considered 'remarried' within the provisions of Section 202(g) of the Social Security Act?" (138 F. Supp. at 944).

It then proceeded to reject the *Sefton* case and to affirm its prior decision in favor of the present appellee. R. 33; 138 F. Supp. at 944.

It should be clear that neither the *Sefton* decision, nor any other state court decision, should determine when a widow is to be considered remarried within the meaning of Section 202(g) of the Act. The effect of the Federal law should not be made dependent on the interpretations of various state laws by various state courts. We cited the *Sefton* case to the court below only because it so clearly shows that the law of California, upon which the court had relied in its memorandum opinion, was not as the appellee contended nor as the court had construed.

The *Sefton* decision clearly shows that insofar as the law of California is concerned, the annulment of a voidable marriage does not expunge that marriage from the record. Rather, it shows that the voidable marriage existed until annulled, and that the effect to be given to an annulment varies from case to case, depending on the circumstances and the persons concerned. The following excerpt from the decision in the *Sefton* case demonstrates that in no case will the fiction of the "relation back" of the decree of nullity be invoked to the prejudice of third parties who were not party to the annulment proceedings:

“* * * the doctrine of ‘relation back’ is not without its exceptions. The doctrine was fashioned by our courts to do substantial justice *as between the parties to a voidable marriage*. It is a mere legal fiction which has an appeal when used as a device for achieving that purpose. * * *

“However, in cases involving the rights of third parties, courts have been especially wary lest the logical appeal of the fiction should obscure fundamental problems and lead to unjust or ill-advised results respecting a third party’s rights.” (45 C. 2d at 875, 291 P. 2d at 441; italics ours.)

Yet this is precisely what the court below did—by holding that the decree annulling appellee’s marriage related back to the date of the contracting of the marriage, the court adversely affected the rights and obligations of appellant, and particularly of the Board of Trustees of the Federal Old-Age and Survivors Insurance Trust Fund, which is established by Section 201 of the Act (42 U.S.C.A. 401).

Moreover, the court below also overlooked the fact that its jurisdiction is confined to reviewing the appellant’s decision pursuant to the provisions for judicial review specified in Section 205(g) of the Act (42 U.S.C.A. 405(g)) and that a Federal District Court has no power to exercise the functions of a state court, particularly discretionary functions which the state court might or might not exercise in a particular case. Thus, assuming *arguendo* that a state court in a case involving the question as to whether or not it should apply the fiction of “relation back” to the appellee’s decree of annulment would have decided to

apply that fiction as between the appellee and Richard or a third party over whom it had jurisdiction, it would seem obvious that not even a state court could have applied that fiction so as to affect the rights of a third party over whom it had no jurisdiction. It would necessarily follow, therefore, that the court below, exercising the limited jurisdiction conferred by Section 205(g) of the Act, *supra*, was not empowered to apply the fiction of "relation back" so as to give appellee's decree of annulment an effect adverse to the rights of the Secretary of Health, Education, and Welfare or of the Trustees of the Federal Old-Age and Survivors Insurance Trust Fund.

III.

THE DECISION OF COURT BELOW DOES PREJUDICE TO RIGHTS OF DEFENDANT AND OF POSSIBLE INNOCENT THIRD PARTIES.

It should be clear that the fiction of "relation back" of a decree of annulment of a voidable marriage could not in any case be applicable in the present situation because of Section 86 of the Civil Code of California, which provides:

"A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them."

Also, it should be clear that the Social Security Administration was neither a party to the action in which appellee secured the annulment of her marriage nor did the Social Security Administration claim any

right derived from either party to that action. In *Price v. Price*, 24 C.A.2d 462, 75 P.2d 655 (1938), which we cited below, the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, annulling a marriage contracted in Mexico by a divorced woman with a person other than her divorced husband, was held not conclusive as to the divorced husband. The District Court of Appeal accordingly held that, regardless of the validity of the judgment annulling the marriage, the divorced husband was not obliged to continue payments to his divorced wife under the separation agreement after the date of the remarriage in Mexico. The court below, in its memorandum opinion, stated that in the *Price* decision the court had examined the validity of the decree of annulment and found that the judgment was granted by a local court for a cause not authorized by California law, and that the District Court of Appeal therefore held that the third party, her husband by her first marriage, was not bound by the decree. In the instant case, the court below pointed out that appellee's second marriage was annulled on a ground which is proper under the California laws.

We respectfully direct the attention of this Court to the statement of the District Court of Appeal in the *Price* case:

“Regardless of the question of the right of the superior court in Los Angeles to render a judgment of nullity of the marriage contracted in Mexico insofar as it concerns plaintiff and Bergstedt, a question we consider unnecessary to de-

cide, we are satisfied that the decree is not conclusive as to defendant in the present litigation, is not binding upon him, and does not have the effect of obligating him to carry out the terms of the property settlement agreement.” (24 C.A. 2d at 467; 75 P.2d at 658; italics ours.)

It is obvious that the District Court of Appeal specifically refused to determine whether the decree of nullity was properly granted and squarely placed its decision upon the ground that such decree could not be binding on a third party, the plaintiff’s former husband. The decision of the District Court of Appeal in the *Price* case is approved by the California Supreme Court in *Sefton v. Sefton*, *supra*, where the latter court, citing the *Price* case, pointed out that a legislative caveat against the doctrine of “relation back” of a decree of annulment may fairly be inferred from Civil Code Section 86 (45 C.2d at 876; 291 P.2d at 441).

The court below also sought to avoid the effect of Section 86 of the California Civil Code by holding that policy considerations are in favor of the appellee in that she had acted in good faith and no one, including the defendant, would be injured by reinstating her mother’s insurance benefits. As stated above, this is also the basis upon which the court below held that the rationale of the *Sefton* case was not applicable in the present situation.

It is difficult to understand what is meant by the statement of the court below that “it is clear that defendant has not been prejudiced.” 138 F. Supp. at

944. That defendant, appellant herein, is charged by Congress with the duty of administering the provisions of the Act and has the duty to carry out the mandate of Congress that a woman who is awarded "mother's insurance benefits" shall not receive such benefits later than the month last preceding the month in which she remarries. The appellee remarried and by the very terms of the Congressional enactment, her entitlement to benefits ceased. The appellant is obviously and necessarily prejudiced by an order that he reinstate those benefits contrary to express Congressional mandate. The mere availability of funds to make the payment in question is irrelevant. The fact that appellee, had she not remarried, would have continued receiving mother's insurance benefits does not justify the payment to her of benefits when she has in fact remarried.

Moreover, those portions of the opinions of the court below which are based upon the references to the availability of Social Security funds for further payments to appellee had she not remarried, as an argument for reinstatement of benefits upon the annulment of the marriage, should by parity of reasoning apply also to the situation where the remarriage is terminated by divorce or death. We think it is too obvious to require discussion that the Act does not provide for reinstatement of benefits where the remarriage of a widow terminates by divorce or death.

There is certainly no logic in the argument that the appellee, because she was an innocent party, should be entitled to reinstatement of benefits. As be-

tween two innocent parties, certainly no preference can be given to that party who has been active in effecting a change in the situation. In addition, if benefits are to be reinstated in the present case, it would appear that the innocence or fault of the appellee is entirely irrelevant. There is as much justification in the language of the Act for reinstating mother's insurance benefits where the remarriage is induced by the fraud of the beneficiary as where it is induced by the fraud of the other spouse. In either case, the appellant had no part in the fraudulent action and claims no rights derived from either party to the fraudulent action.

Moreover, under the decision of the court below there frequently would be cases in which innocent third parties other than the appellant herein would be seriously prejudiced. There might well be many cases in which children who had been awarded and were receiving "child's insurance benefits" under Section 202(d) of the Act (42 U.S.C.A. 402(d)) would be adversely affected by the reinstatement of the remarried widow to mother's insurance benefits. The total monthly benefits payable on the account of any one wage earner cannot exceed 80 per cent of the wage earner's average monthly wage or $1\frac{1}{2}$ times his primary insurance amount, whichever is the greater, and in no case may the total exceed \$200. Section 203(a) of the Act (42 U.S.C.A. 403(a)). In many cases a wage earner is survived by a widow and several minor children. The 1956 amendments of the Act (P.L. 880, 84th Congress, 2d Session, Section

101(a); 70 Stat. 807), also authorize benefits in the future for disabled children over the age of 18. When the widow remarries and her benefits are thereby terminated, the benefits awarded to the children may be correspondingly increased. If, upon the annulment of a voidable marriage of the widow she becomes entitled to have her benefits reinstated, it would then necessarily follow that the increased award of benefits to the children would have to be reduced. The situation would be particularly prejudicial where the children were not all in the care of the widow of the wage earner. The wage earner might well leave several children, one or more of whom might be cared for by some one other than the wage earner's widow. In fact, the wage earner might leave children by a former marriage who are cared for by his former divorced wife who is herself entitled to receive mother's insurance benefits so long as she has not remarried and has a child of the wage earner in her care and meets the other conditions of entitlement prescribed by Section 202(g) of the Act (42 U.S.C.A. 402(g)).

While in the present case no reduction of benefits to the wage earner's child would be necessitated upon the reinstatement of the appellee to mother's insurance benefits, this is due to the fortuitous circumstance that the wage earner was survived by only one child eligible for child's insurance benefits. Had he been survived by the appellee and three children entitled to child's insurance benefits, the latter would have been reduced by the entitlement of the appellee and, hav-

ing been increased when her entitlement terminated, would again have to be reduced under the decision of the court below.

IV.

THE DECISION BELOW MISAPPLIES THE PRINCIPLE OF LIBERAL CONSTRUCTION OF WELFARE LEGISLATION.

The court below, in both its memorandum opinion and its supplemental memorandum opinion, reasoned that the Act is entitled to a liberal construction and that the refusal to reinstate the appellee to mother's insurance benefits would be contrary to the liberal construction which has in other cases been accorded the Act. The court reasoned that policy considerations favored such a construction. 138 F. Supp. at 943 and 944.

We submit that the court below misapplied the rule of liberal construction. The same argument has been urged in other cases by applicants or beneficiaries of the Act in an effort to secure an interpretation contrary to its express terms. Such arguments, however, have not been successful. For example, in *Ewing v. Risher*, 176 F.2d 641 (10th Cir. 1949), the argument was rejected at page 664 on the grounds that the Congressional purpose must be ascertained from the clear language of the Act and that no liberal interpretation warrants the adoption of a construction inconsistent with the clear wording of the Act. See also *Moncrief v. Hobby*, 133 F.Supp. 152 (D.Md. 1955), wherein it is clearly stated that courts are not justified in chang-

ing the wording of the law to meet a particular situation even where it might plausibly be thought that the legislative body might have changed the wording had the particular situation been contemplated:

“On the contrary, where the language of the statute is plain and unambiguous and does not result in absurd or obviously unintended results, courts are not at liberty to make substitution in language to meet the supposed equity of a particular case.” (133 F.Supp. at 158-159.)

This decision was later affirmed sub nom. *Moncrief v. Folsom*, 233 F.2d 471 (4th Cir. 1956).

The court below ignored this principle in the name of liberal construction by reading into the Act a proviso that in the event of the subsequent annulment of the widow's remarriage, entitlement to benefits which had terminated upon her remarriage should be reinstated even though the parties were lawfully husband and wife during the period of the voidable marriage.

As we have previously stated, this is a case of first impression. In such a case, the interpretation of a law by the agency to which Congress has entrusted its administration is entitled to weighty consideration. For example, in *U.S. et al. v. LaLone et al.*, 152 F.2d 43 (1945), involving the interpretation of other sections of the Act, this Court stated at page 45:

“The (Social Security) board's decisions interpreting the Act and regulations are entitled to weight; the board's findings of fact, if supported by substantial evidence, are conclusive.”

The Supreme Court of the United States in *Hormel v. Helvering*, 312 U.S. 552 (1941) said in footnote 5 at page 556:

“The Board’s rulings on questions of law, while not as conclusive as its findings of fact, are nevertheless persuasive * * *. This is true not only of the Board of Tax Appeals but of other administrative bodies as well.”

And in *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F.Supp. 187, (S.D. N.Y. 1934), that court stated at page 189:

“This administrative interpretation of the law is, of course, not conclusive, but it is entitled to weighty consideration.”

In the present case there is no dispute as to the facts. The findings of the referee, which constitute the findings of the appellant’s predecessor as Secretary of Health, Education, and Welfare, are supported by substantial evidence and therefore conclusive under Section 205(g) of the Act (42 U.S.C.A. 405 (g)). Even where there is no dispute as to the evidentiary facts, a court may not substitute its inferences and conclusions therefrom for those of the administrative agency:

United States et al. v. LaLone et al., supra;
Walker v. Altmeyer et al., 137 F.2d 531 (2d Cir. 1943);
Livingstone v. Folsom, 234 F.2d 75 (3d Cir. 1956);
Social Security Board v. Warren, 142 F.2d 974 (8th Cir. 1944).

We submit that the District Court, in determining the legal effect of the admitted facts in this case, not only failed to give any weight to the administrative interpretation of the statute, but in the name of "liberal construction" ignored clear provisions of the Act and *added* thereto a provision which has no support in Congressional language or policy.

CONCLUSION.

For all of the foregoing reasons, we submit that the District Court erred in holding that the appellee was entitled to reinstatement of mother's insurance benefits upon the annulment of her remarriage on the ground that it was a voidable marriage. The judgment of the District Court should therefore be reversed by this Court.

Respectfully,

LLOYD H. BURKE,

United States Attorney,

WILLIAM B. SPOHN,

Assistant United States Attorney,

Attorneys for the Appellant.

Of Counsel:

ARTHUR C. MILLER,

ELIZABETH M. DOYLE,

Attorneys, Department of Health,

Education, and Welfare.

November, 1956

No. 15,218

IN THE
United States Court of Appeals
For the Ninth Circuit

MARION B. FOLSOM, Secretary of the
Department of Health, Education,
and Welfare,

Appellant,

VS.

GRETTA N. PEARSALL,

Appellee.

On Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR THE APPELLEE.

CHALMERS SMITH,
85 West Santa Clara Street,
San Jose 13, California,
Attorney for Appellee.

FILED

FEB 14 1957

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Jurisdictional statement	1
Question presented	2
Principal statutory provisions	3
Abstract of the case	4
Summary of argument	4
Argument	6
I. The doctrine of an annulment “relating back” so as to wipe out a marriage from its beginning, while not without its exceptions, has been consistently applied to voidable marriages which would terminate benefits paid under beneficent statutes similar to the act	6
II. The court below was correct in distinguishing the decision of Hahn v. Gray and rejecting cases construing divorce property settlements	14
III. The term “remarries” in Section 202(g) of the act is not a termination event if the remarriage is annulled by proper proceedings instituted in a state court	19
IV. The annulment of appellee’s remarriage should be conclusive as to appellant, and does not materially prejudice the right of any other third parties	21
V. Policy considerations and liberal construction of the act require that plaintiff’s benefits be reinstated and the decisions of the court below be affirmed	26
Conclusion	30

Table of Authorities Cited

Cases	Pages
Eureka Block Coal Company v. Wells, 83 Ind. App. 181 147 N.E. 811 (1925)	4, 8, 9, 10, 11, 24, 27
First National Bank v. North Dakota Workmen's Comp. Bureau, N.D., 68 N.W. 2d 661 (1955)	5, 9, 11, 24
Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E. 2d 290 (1954)	8, 26
Hahn v. Gray, 203 F. 2d 625 (C.A.D.C. 1953) ...	14, 16, 23, 24, 26
In Re Moncrief's Will, 235 N.Y. 390, 139 N.E. 550 (1923) ..	16
Mays v. Folsom, 143 F. Supp. 784 (D. Idaho 1956)	5, 9, 13, 15, 24, 25, 27
McDonald v. McDonald, 6 C. 2d 457, 58 P. 2d 163 (1936)	6, 7, 11, 12
Millar v. Millar, 175 Cal. 797, 167 P. 394 (1917)	7, 23, 29
Newsom v. Social Security Board, 70 F. Supp. 962 (E.D. Michigan, 1947)	17, 23, 28
Pearsall v. Folsom, 138 F. Supp. 939 (N.D. California, 1956)	13
Price v. Price, 24 C.A. 2d 462, 75 P. 2d 655 (1938)	21, 22
Ray v. Social Security Board, 73 F. Supp. 58 (S.D. Ala- bama, 1947)	10
Sanders v. Altmeyer, 58 F. Supp. 67 (W.D. Tenn. 1944) ...	10
Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P. 2d 845 (1937)	7
Sefton v. Sefton, 45 C. 2d 872, 291 P. 2d 439 (1955)	7, 8, 11, 16, 17, 18, 21, 22, 23, 26
Southern Pacific Co. v. Industrial Commissioner, et al., 51 Ariz. 1, 91 P. 2d 700 (1939)	4, 8, 10, 24
Southern Ry. Co. v. Baskette, 175 Tenn. 253, 133 S.W. 2d 498 (1939)	5, 8, 10, 24
Stuart v. Hobby, 128 F. Supp. 609 (S.D. New York, 1955)	10
United States v. Silk, 331 U.S. 704 (1947)	10, 17

Statutes

California Civil Code:	Pages
Section 55	20
Section 82	28
Sections 84 and 85	7
Section 86	21, 22
 Social Security Act:	
Section 202(d) (42 U.S.C.A. 402(d))	12, 13, 24, 25, 26
Section 202(e) (42 U.S.C.A. 402(e))	26, 28
Section 202(f) (42 U.S.C.A. 402(f))	26
Section 202(g) (42 U.S.C.A. 402(g))	
.....	3, 5, 12, 17, 19, 20, 24, 26, 28
Section 202(h) (42 U.S.C.A. 402(h))	26
Section 205(g) (42 U.S.C.A. 405(g))	1, 2
 28 U.S.C.A. 1291	2

Texts

55 C.J.S., Marriage, Section 1b	20
---------------------------------------	----

No. 15,218

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARION B. FOLSOM, Secretary of the
Department of Health, Education,
and Welfare,

Appellant,

VS.

GRETTA N. PEARSALL,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

BRIEF FOR THE APPELLEE.

JURISDICTIONAL STATEMENT.

This appeal arises from an action instituted by the appellee as plaintiff in the District Court for judicial review of a final decision of the appellant's predecessor in office under Section 205(g) of the Social Security Act as amended (42 U.S.C.A. 405(g)), hereinafter designated as the Act. The complaint for review is set forth at pages 4-8 of the transcript of record, hereinafter designated as R.—, and the decision of the appellant's predecessor is set forth at

pages 8-10 of the transcript of the administrative proceedings, which has been stipulated as an exhibit herein (R. 39-40) and is hereinafter designated as Adm. Tr.—. Following the answer to the complaint (R. 9-13), motions for summary judgment were filed by the respective parties (R. 13-17) and heard by the District Court, which later issued a memorandum opinion ordering judgment for the plaintiff (R. 17-26). The defendant moved for reconsideration (R. 27-30), was duly heard, and the District Court issued a supplemental memorandum opinion affirming judgment for the plaintiff (R. 30-33). The opinions of the District Court have since been reported at 138 F. Supp. 939 (1956). Summary judgment was accordingly entered, denying the defendant's motion, granting the plaintiff's motion, reversing the decision of the defendant's predecessor, and remanding the proceedings to the Department of Health, Education, and Welfare, pursuant to the said Section 205(g) of the Act (R. 34-35). A notice of appeal therefrom was timely filed by the defendant (R. 35). Jurisdiction of this Court to hear and determine the appeal is conferred by the aforesaid Section 205(g) of the Act as amended and 28 U.S.C.A. 1291.

QUESTION PRESENTED.

Whether the District Court erred in holding that the present appellee, whose mother's insurance benefits as the unremarried widow of a deceased wage earner had been terminated by her remarriage in ac-

cordance with Section 202(g) of the Act (42 U.S.C.A. 402(g)), was entitled to reinstatement of those benefits upon the annulment of her remarriage on the ground that such was a voidable marriage.

PRINCIPAL STATUTORY PROVISIONS.

Section 202(g) of the Act, *supra*, provides for mother's insurance benefits in pertinent part as follows:

“The widow * * * of an individual who died a fully or currently insured individual after 1939, if such widow * * *

(A) has not remarried

* * *

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit * * * shall be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow * * * becomes entitled to an old age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, she remarries, or she dies. * * *”

ABSTRACT OF THE CASE.

The facts of this case, (which have never been disputed), are set forth in full on pages 4 and 5 of the Brief for the Appellant on this appeal.

SUMMARY OF ARGUMENT.

The effect of a decree of annulment of a voidable marriage on the rights of the parties thereto and upon the rights of third parties has caused considerable litigation in the Courts. While it has been said that an annulment decree "relates back" so as to determine that no valid marriage ever existed, the question whether or not the doctrine of "relation back" will be literally applied seems to have varied from case to case, depending on the dictates of sound policy and justice. Thus, children of an annulled California marriage are deemed legitimate, and community property rights of the parties are respected in equity when the marriage was entered into in good faith.

However, in the factual situation on this appeal, where a person receiving benefits under a beneficent statute such as the Act marries, and because of that marriage has those benefits terminated under the terms of the statute or case law, and later that marriage has been annulled as voidable, the fiction of "relation back" has been consistently applied so as to reinstate the beneficiary to her original payments. *Eureka Block Coal Company v. Wells*, 83 Ind. App. 181, 147 N.E. 811 (1925); *Southern Pacific Co. v. Industrial Commissioner, et al.*, 51 Ariz. 1, 91 P. 2d 700

(1939); *Southern Ry. Co. v. Baskette*, 175 Tenn. 253, 133 S.W. 2d 498 (1939); *First National Bank v. North Dakota Workmen's Comp. Bureau*, — N.D. —, 68 N.W. 2d 661 (1955); *Mays v. Folsom*, 143 F. Supp. 784 (D. Idaho, 1956).

It is true that where two divorced persons enter into a property settlement agreement which provides that support money to the wife terminates on her remarriage, and the wife does remarry later having her remarriage annulled, the Courts have refused to force the husband to resume paying alimony. But these cases are distinguishable from the present one and the others just cited. No liberal construction can be used in interpreting a property settlement agreement, while statutes similar to the Act must be liberally construed. Even more important is the fact that in the divorce cases, the Courts have rested their decision on the grounds that the first husband has a right to rely on his former wife holding herself out as remarried, and that he should then in safety be able to recommit his assets originally chargeable to support. On the other hand, no such prejudice appears here, for it is plain that no one was led into any shifting of assets by appellee's second "marriage."

Aside from the case law, policy considerations favor appellee here. The purpose of Section 202(g) of the Act is to enable a widowed mother to refrain from seeking gainful employment and thus to remain at home with her child, giving the child the advantages of parental guidance. This purpose was fulfilled by appellant when he granted to appellee "mother's in-

surance benefits" before her voidable second marriage. The need of appellee and her child are just as great now as before her second marriage ceremony, for appellee cannot receive support money from her second "husband" under the California law of annulment. The objectives of the Act can just as well be fulfilled. Appellant should not penalize appellee for the mere act of entering into a marriage into which she was fraudulently induced.

ARGUMENT.

I.

THE DOCTRINE OF AN ANNULMENT "RELATING BACK" SO AS TO WIPE OUT A MARRIAGE FROM ITS BEGINNING, WHILE NOT WITHOUT ITS EXCEPTIONS, HAS BEEN CONSISTENTLY APPLIED TO VOIDABLE MARRIAGES WHICH WOULD TERMINATE BENEFITS PAID UNDER BENEFICENT STATUTES SIMILAR TO THE ACT.

The question of the effect of an annulment of a marriage on the rights of the parties thereto, and upon third persons, has often been before the courts of this country and has not been unattended with difficulty. Generally speaking, it has been said that when a California Court annuls a voidable marriage, contracted in California, that the decree of nullity erases the marriage from its outset. *McDonald v. McDonald*, 6 C. 2d 457, 58 P. 2d 163 (1936).

In the *McDonald* case, the California Supreme Court compared a voidable marriage, subject to annulment, with a voidable contract, subject to rescission. Both the marriage and the contract are valid and

binding for all purposes unless suit is begun or notice of rescission is given, but if such action is taken, then the parties thereto are restored to their original status or position. Unlike a divorce, which dissolves an admittedly valid marriage for a cause arising after the marriage, an annulment decree relates back and determines that an element of invalidity existed at the time of the marriage ceremony and, therefore, that *no valid marriage ever existed. McDonald v. McDonald*, 6 C. 2d at 461, 58 P. 2d at 165. Giving effect to this rule it is the law in California that permanent support money cannot be given even to an innocent wife who has had her voidable marriage annulled. *Millar v. Millar*, 175 Cal. 797, 810, 167 P. 394, 399, (1917).

The doctrine of "relation back," embodied in the *McDonald* decision, is not, of course, without its exceptions. It has been stated that it will be applied only when it will conform to the sanctions of sound policy and justice as between the parties thereto, their property rights and the rights of their offspring. *Sefton v. Sefton*, 45 C. 2d 872, 875, 291 P. 2d 439, 441 (1955). Thus, children born not only of a voidable marriage but also of void marriages are deemed legitimate. California Civil Code, Sections 84 and 85. Property acquired by parties to a voidable or void marriage is often treated as community property if the marriage was entered into in good faith. *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 69 P. 2d 845 (1937). Furthermore, it is now the rule that where the parties to a divorce enter into a separation agreement providing for alimony for the wife until she remarries, and

the wife does remarry, later having her remarriage annulled as being voidable, that the obligation of the first husband to pay alimony is not revived. *Sefton v. Sefton*, supra, *Gaines v. Jacobsen*, 308 N.Y. 218, 124 N.E. 2d 290 (1954).

None of the two aforementioned lines of case, however, whether applying the doctrine of an annulment "relating back," or falling within the exception to that rule have dealt with the problem of the present case, which involves the effect of an annulment on the term "remarries" appearing in a statute similar to the Act. The appellant, citing the exception cases, contends that the fiction of "relation back" does not apply, and that when the Act provides that benefits terminate upon a marriage or remarriage, then those benefits terminate once and for all, even if the voidable marriage or remarriage is annulled.

This contention, though, is conspicuously unsupported by any direct case authority. Indeed, when the precise question presented on this appeal has arisen before for decision the courts have consistently rejected the position of appellant, have applied the doctrine of an annulment "relating back," and have reinstated persons in appellee's position to the benefits they were receiving before the marriage in question.

Eureka Block Coal Company v. Wells, 83 Ind. App. 181, 147 N.E. 811 (1925).

Southern Pacific Co. v. Industrial Commissioner, et al., 51 Ariz. 1, 91 P. 2d 700 (1939).

Southern Ry. Co. v. Baskette, 175 Tenn. 253, 133 S.W. 2d 498 (1939).

First National Bank v. North Dakota Workmen's Comp. Bureau, — N.D. —, 68 N.W. 2d 661 (1955).

Mays v. Folsom, 143 F. Supp. 784 (D. Idaho 1956).

The first four decisions, just cited, are Workmen's Compensation cases. The last involves a lower Federal Court's interpretation of the Act itself.

In the *Eureka Block Coal Co.* case, the plaintiff had been awarded Workmen's Compensation benefits as the widow of an employee who had been accidentally killed. The widow then remarried, her benefits terminated, and subsequently she procured an annulment on the grounds that her remarriage was voidable for fraud. The Indiana Workmen's Compensation Statute involved read as follows: ". . . the dependency of a widow . . . shall terminate with . . . her marriage subsequent to the death of the employee . . ." In rejecting precisely the same points which appellant contends for here, and reinstating the widow to her benefits the Indiana Court stated:

"Giving the provision referred to a broad and *liberal* construction, as we must, a marriage within the meaning of the statute is *not* a void or *voidable* marriage which may at once be annulled, but a valid and subsisting marriage." (147 N.E. at 812.) (Italics ours.)

It is plain that the Indiana statute in the *Eureka Block* case and the section of the Act to be construed on this appeal are substantially alike. Certainly, the same liberal construction which the Indiana Court

applied is applicable to the Social Security laws. *United States v. Silk*, 331 U.S. 704 (1947).

Citing the case of *Sanders v. Altmeyer*, 58 F. Supp. 67 (W.D. Tenn. 1944), appellant, at page 19 of his opening brief, seeks to distinguish the *Eureka Block* decision on the grounds that while dependency is the primary consideration under Workmen's Compensation laws, status or relationship is controlling under the Act, and that, therefore, Workmen's Compensation cases have been rejected as guides for interpretation of the Act. This distinction seems spurious at best, but suffice it to say that later Federal decisions enunciating the purpose of the Act have stressed the element of relieving hardship on dependents as that for which the Act was designed. *Ray v. Social Security Board*, 73 F. Supp. 58 (S.D. Alabama, 1947); *Stuart v. Hobby*, 128 F. Supp. 609 (S.D. New York, 1955). The *Sanders* case, cited by appellant, does *not* hold that Workmen's Compensation cases never will be used to help construe the Act, and certainly this should not be so where the facts are so similar, and the purposes of the two sets of statutes so much alike.

The facts and conclusions reached in the cases of *Southern Pacific Co. v. Industrial Commissioner*, *supra*, and *Southern Ry. Co. v. Baskette*, *supra*, are practically identical with the *Eureka Block Coal Company* case, although, in the former, the plaintiff lost her suit because the Arizona Court considered her annulment invalid. In both decisions the courts held that a *voidable* remarriage, which has been annulled from the beginning, was not such a remarriage that

it would terminate benefits paid under Workmen's Compensation laws. The *Eureka Block Coal Company* case was cited with approval in both opinions. Except for reiterating that Workmen's Compensation laws stress dependency while relationship is the primary concern under the Act, appellant makes no attempt to distinguish these cases from his own.

The holding in *First National Bank v. North Dakota Workmen's Compensation Bureau*, supra, is particularly important as North Dakota and California have the same annulment statutes. (68 N.W. 2d at 664.) Factually, the situation in that case involved a deceased workman's daughter whose Workmen's Compensation benefits had been terminated by her marriage. She then had her voidable marriage annulled and sued for her back benefits. The Court, therefore, not only had before it the precise question of law presented on this appeal, but also had to consider statutes identical to the California laws involved here. In awarding the plaintiff complete reinstatement of her benefits from the time of her marriage ceremony, the North Dakota Supreme Court, after quoting extensively from *McDonald v. McDonald*, supra, stated as follows:

"Some exceptions have been made to the rule that as to a voidable marriage a decree of annulment makes the marriage void from its inception. Both the rule and the exceptions are ably discussed in *Callow v. Thomas*, 332 Mass. 550, 78 N.E. 2d 637, 2 ALR 2d 632, (1948). *In most instances these exceptions are concessions to equitable principles which have no application to this case.* We follow

the rule and hold that the decree of annulment made the marriage void ab initio. Edith Mae Charon is entitled to receive payment from the Workmen's Compensation Bureau as though no marriage ceremony ever took place." (68 N.W. 2d at 665.) (*Italics ours.*)

Appellant's attempt to avoid the effect of this decision is somewhat puzzling. At pages 19 and 20 of his brief he states that the case is inapplicable because the North Dakota statute specifically recognizes the reinstatement of widow's benefits if her remarriage is annulled, if the action for annulment is filed within six months of the remarriage. Whatever the North Dakota statutory Workmen's Compensation law may be it most certainly was not the grounds for the holding in this case. Such a statute is never mentioned in the opinion of the court, and the decision is based entirely on the *McDonald* case doctrine of an annulment relating back so as to wipe out a marriage. The court held that the daughter was entitled to reinstatement of her benefits from the time of her *marriage ceremony*, thus even going much further than what plaintiff asks here, which is reinstatement from the date of her annulment.

Mays v. Folsom, supra, is the last case cited above dealing with facts similar to those on this appeal, and it is directly in point here. Section 202(d) of the Act (42 U.S.C.A. 402(d)) provides for "child's insurance benefits," and, like Section 202(g) of the Act (42 U.S.C.A. 402(g)), which is to be construed here, provides that such insurance benefits shall end upon the

marriage of the person receiving them. In the *Mays* case the child involved was receiving benefits under Section 202(d) when she married and payments to her were terminated. She then had her marriage annulled on the grounds that as a minor the consent of her parents was not obtained and, therefore, the marriage was voidable. Upon appellee's refusal, as here, to resume payments the Federal District Court in Idaho reinstated the child's benefits as of the time of the annulment decree.

If the *Mays* case had been an appellate court decision, it might well have been conclusive here. It is not, however, and admittedly, the opinion is based on the lower court decision in *Pearsall v. Folsom*, 138 F. Supp. 939 (N.D. California, 1956), which is before this court on this appeal. It is significant, however, that another Federal Judge has also rejected the same arguments advanced by appellant in his brief here, and followed the decision of the lower court in this case as "very well reasoned." (143 F. Supp. at 786.)

Appellant strongly contends that in construing a Federal statute, a Federal Court is not bound by State Court interpretations, such as those cited by appellee. This is, of course, true, but when the only decisions, state or Federal, cited by *either* party, which interpret statutes similar to the one in question here, all favor appellee, that fact at least should be highly persuasive.

II.

THE COURT BELOW WAS CORRECT IN DISTINGUISHING THE
DECISION OF *HAHN v. GRAY* AND REJECTING CASES CON-
STRUCTING DIVORCE PROPERTY SETTLEMENTS.

The two decisions cited by appellant most nearly analogous to the factual situation presented here are the cases of *Hahn v. Gray*, 203 F. 2d 625 (C.A.D.C. 1953) and *Sefton v. Sefton*, *supra*.

In the *Hahn* case the plaintiff therein had been receiving a pension as the unremarried widow of a veteran. When she remarried the pension was discontinued pursuant to regulations of the Veterans' Administration. A New York court annulled the second marriage on the ground that it was voidable for fraud, and she then applied for restoration of the pension. The Administrator of Veterans' Affairs denied the application and was affirmed by the Court of Appeals for the District of Columbia.

The factual situation of the *Hahn* case is somewhat similar to the present one, but the opinion of the Court therein clearly shows that the law of that case is clearly inapplicable to this one. The *Hahn* decision is based entirely on a jurisdictional ground, and the language dealing with the annulment problem is patently dicta. However, even assuming that such language represents a decision by the Court, the wording of the dicta differentiates itself from the facts herein and actually lends itself more to the support of appellee. The Court expressly states that the annulment in the *Hahn* case was *not* an annulment *ab initio*, (as

were the annulments in this case (Adm. Tr. 30-31), the case of *Mays v. Folsom*, supra, and the Workmen's Compensation decisions heretofore cited as authority for appellee). The Court observed:

“Under the New York Law, some marriages, such as those involving incest or bigamy are void *ab initio*, but others, including marriages induced by fraud, are merely voidable, and are valid for all purposes until judicially declared void. (Citations.)

So in this case. The decree annulling Mrs. Hahn's second marriage, by its very terms, merely dissolved the marriage, “*heretofore existing*” between the parties; it did *not* purport to render the marriage *void from its very inception*. Moreover, that decree did not become effective until three months *after* it was handed down. The only possible conclusion is that Mrs. Hahn was legally remarried for some period of time; namely, from the date of the ceremony until three months after the entry of the annulment decree. Under the circumstances, appellant was no longer the unremarried widow of a veteran and was properly denied restoration to the pension rolls.” (203 F. 2d at 626.) (Italics ours.)

It would seem clear that what the Court meant by the above language is that a void marriage is no marriage at all; that a voidable marriage is valid for all purposes “until judicially declared void”; that since the decree of annulment only purported to annul the voidable marriage as of three months *after* the date of the annulment decree, then there must still be a

period of time of the voidable marriage that had not been annulled and therefore was still valid for all purposes. This, plaintiff does not dispute.

It is true that a New York annulment of a voidable marriage such as that involved in the *Hahn* decision, is normally said to be *ab initio*. *In Re Moncrief's Will*, 235 N.Y. 390, 139 N.E. 550 (1923). However, it is apparent that Mrs. Hahn's decree must not have been such an annulment, or else the elaborate explanation in the *Hahn* opinion that the decree did not become effective until three months after it was handed down would be completely inapplicable. As it stands, appellee contends that the *Hahn* dicta supports her position.

The second decision cited by appellant most nearly analogous to the present facts is the case of *Sefton v. Sefton*, supra. In that case the California Supreme Court held that the annulment of a divorced wife's voidable remarriage would not reinstate the wife to support money she had formerly received under a property settlement agreement with her first husband. The voidable remarriage, even when declared null and void, was held a remarriage within the meaning of the property settlement agreement which provided that the wife's alimony should continue "until her death or remarriage."

There are two major distinguishing features of the *Sefton* decision from the present case, and both of these were rightly recognized by the Court below in its memorandum opinion. (R. 31 and 138 F. Supp. at 944.)

The first difference between the two cases is that the *Sefton* case involved the construction of the word "remarries" as used in a *property settlement agreement*, while this action turns on the meaning of the same word as set forth in a *beneficent statute*. The *Sefton* property settlement could not be the subject of any liberal construction. Section 202(g) of the Act which is involved here, however, must be liberally construed to effect its purpose. *United States v. Silk*, *supra*. That purpose is to relieve a widowed mother of a child from financial stress so that, if necessary, she might forego gainful employment in order that she might devote sufficient time to the welfare of the child. *Newsom v. Social Security Board*, 70 F. Supp. 962 (E. D. Michigan, 1947). That was the need of appellee equally both before and after her second marriage, but despite the liberal construction applied to the Act, appellant seeks to penalize appellee for an innocent mistake. He should not be allowed to do so.

The second distinguishing feature of the *Sefton* case from the one here is by far the more important. It is based on the entire reasoning of the California Supreme Court in the *Sefton* opinion. The Court stated that Mrs. Sefton by the celebration of a marriage held herself out as having been remarried and that "the defendant was entitled to rely upon her apparent material status after the ceremony . . . He was then entitled to recommit his assets previously chargeable to alimony to other purposes." (45 C. 2d at 876-877, 291 P. 2d at 441-442.) After recognizing the fact that whether or not the doctrine of "relation

back'' of an annulment is strictly applied usually depends on policy considerations, the Court concluded that the resultant prejudice to Mr. Sefton, the first husband, was substantial enough so that the doctrine should not be applied.

In this case, however, no person could possibly be prejudiced or misled into recommitting any assets. Appellee's first husband, who in this case is analogous to Mr. Sefton, is dead, and appellee's Social Security benefits were instituted *not* because of any divorce, but because of that death. The payments which appellee's first husband paid into the Federal Old Age and Survivor's Insurance Trust Fund were completed upon his death and in no way can be increased, even as to his estate.

It can also certainly be said that no person connected with appellant was prejudiced by appellee's "remarriage" in the manner envisioned by the California Supreme Court in the *Sefton* case. Surely, neither appellant, nor any other employee of the Department of Health, Education, and Welfare, nor even the Trustees of the Federal Old Age and Survivor's Insurance Trust Fund themselves were deceived into recommitting any of their assets by appellee's second marriage ceremony. To so maintain would be ludicrous. Appellant stood ready under the Act to pay appellee the benefits she was entitled to as the mother of her first husband's child. Whatever funds were available for dispersal before appellee's attempted "remarriage" are still available. Appellant should not be permitted to terminate appellee's payments because of an

innocent act made by appellee through the fraudulent inducement of another.

III.

THE TERM "REMARRIES" IN SECTION 202(g) OF THE ACT IS NOT A TERMINATION EVENT IF THE REMARRIAGE IS ANNULLED BY PROPER PROCEEDINGS INSTITUTED IN A STATE COURT.

One of the main arguments raised by appellant in his opening brief is that the term "remarries," appearing in Section 202(g) as denoting a happening upon which benefits paid under the Act cease, appears only in a section providing for the ending of "mother's insurance benefits." Appellant then contrasts Section 202(g) with other sections of the Act providing only for temporary deductions upon the occurrence of certain events. If Congress had intended an annulment of a remarriage to reinstate Social Security payments, reasons appellant, it would have been a simple matter to do so.

To meet this contention it is necessary to analyze the other events besides remarriage listed in Section 202(g) of the Act which are declared to terminate "mother's insurance benefits." If the mother reaches the age of 65, or dies, or her child reaches 18, or dies, the mother's payments are ended. Each of these happenings involves either the attainment of a certain age or the death of an individual, and it is obvious that, once they have occurred, that event cannot be undone by any power. It was logical, therefore, for Congress

to place them in a section terminating benefits absolutely.

On the other hand "marriage" is defined by Section 55 of the California Civil Code as follows:

"Marriage is a personal relation arising out of a *civil contract*, to which the consent of the parties capable of making that contract is necessary . . ." (Italics ours.)

The California statutory definition of marriage as a civil contract is the rule generally in other states. 55 C. J. S. Marriage, Section 1b. The chief difference between the marriage contract and ordinary contracts is that the marriage contract cannot be revoked or dissolved by the parties, but only by the sovereign power of the state. 55 C. J. S. *ibid*. The important fact here, therefore, is that a marriage or remarriage, *can* be undone or annulled, and in that way differs from the other terminating events of death and attainment of a certain age group listed in Section 202(g). It was logical, however, for Congress to place a remarriage in the same section of the Act as other absolutely terminating events, for the vast majority of marriages are final in the sense that only a minute fraction are ended by annulment.

Appellant's contention that he is supported by the failure of Congress to specifically declare that an annulment of a remarriage reinstates benefits paid under the Act also should not be a bar to such action here. Federal and state statutes are constantly being interpreted by the courts in order to ascertain the intent of a legislative body, or what policy considerations dic-

tate, in the myriad of situations impossible to anticipate when a general rule is drafted. It could just as easily be said that if Congress had wished to follow the position of appellant here, it would have expressly declared that an annulment of a voidable marriage did not reinstate Social Security payments. It seems clear that the annulment situation was not contemplated by Congress, any more than it was foreseen by the legislatures of Indiana, Arizona, Tennessee and North Dakota, where the Workmen's Compensation cases cited above as authority by appellee arose. Yet a liberal construction of those state Workmen's Compensation Statutes guided the state courts to the conclusion argued for by appellee here.

IV.

THE ANNULMENT OF APPELLEE'S REMARRIAGE SHOULD BE CONCLUSIVE AS TO APPELLANT, AND DOES NOT MATERIALLY PREJUDICE THE RIGHT OF ANY OTHER THIRD PARTIES.

Citing Section 86 of the California Civil Code, and the California cases of *Price v. Price*, 24 C.A. 2d 462, 75 P. 2d 655, (1938), and *Sefton v. Sefton*, *supra*, appellant strongly maintains that they are authority for the proposition that the doctrine of "relation back" *never* will be applied to third parties such as appellant in such a way as to affect any of their rights. (See appellant's opening brief, pages 23-27). The *Price* case dealt with the effect of a California annulment of a wife's remarriage upon a property settle-

ment agreement executed between the wife and her first husband, which provided that the first husband's obligations to support his wife ended with her remarriage. With the exception that the remarriage involved in the *Price* case was contracted in Mexico, there is no substantial difference between the fact of the *Price* and *Sefton* cases. The District Court of Appeal held in the *Price* decision that the remarriage of the wife terminated any obligations of the first husband under the property settlement agreement. The Court was undoubtedly influenced by the fact that the annulment was granted on grounds not authorized by California law, but it also based its holding on Section 86 of the Civil Code which reads as follows:

“A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.”

It should immediately be made clear that neither the *Price* or *Sefton* cases, nor Section 86 of the California Civil Code are authority for what appellant says they are. They do *not* state that the doctrine of “relation back” of an annulment *never* will be applied to third parties. They do hold, of course, that as to third parties a decree of annulment is *not always* conclusive, but the best that can be gleaned from them in support of appellant's position is that the courts will be wary before applying the doctrine to those not parties to the annulment action. This is acknowledged by the California Supreme Court which construed both the *Price* case and Section 86 in its *Sefton* opinion and stated:

“Therefore, whatever may be said for the fiction of ‘relation back’ as a general principle in annulment cases, *it must be deemed to apply only where it promotes the purposes for which it was intended.*” (45 C. 2d at 876, 291 P. 2d at 441.) (Italics ours.)

Those purposes, as enunciated by the same decision are to effect a result which conforms to the sanctions of sound policy and justice, and appellee submits that hers is such a case. Appellee and her child have lost the support of appellee’s first husband through his death. Appellee also cannot receive any support from her second “husband,” because her second “marriage” was voidable and annulled. *Millar v. Millar*, *supra*. The needs of appellee and her child are just as great now as before appellee’s second marriage ceremony, and yet appellant, as a penalty for an innocent action, seeks to take away from her benefits designed for the welfare of herself and her child in just such a situation. *Newsom v. Social Security Board*, *supra*. This is clearly inconsistent even with the reasoning of the *Sefton* decision.

It also is interesting to note that the contention of appellant that he cannot be bound by appellee’s annulment is rejected by one of appellant’s own authorities. In *Hahn v. Gray*, *supra*, the Court (203 F. 2d at 626) expressly disagrees with this view. If that part of the *Hahn* opinion dealing with the annulment problem represents the decision of the Court, and is not dicta, as is contended by appellant, then there is substantial Federal appellate authority against him on that point.

In any event, the Courts have consistently ruled that an annulment *ab initio* of a voidable marriage is conclusive as to a third party in appellant's position when construing the Act, or a statute similar in purpose. *Eureka Block Coal Company v. Wells*, supra; *Southern Pacific Co. v. Industrial Commissioner*, supra; *Southern Ry. Co. v. Baskette*, supra; *First National Bank v. North Dakota Workmen's Comp. Bureau*, supra; *Mays v. Folsom*, supra. In the *Eureka Block* case the reasoning was that an annulment was in a sense an *in rem* judgment, binding on all persons whether or not they were parties to it. In the *First National Bank* case, the Court frankly stated in the quotation set forth in Section I of this brief that it applied the doctrine of "relation back," on policy grounds. Whatever the reason, the cases have uniformly supported the position of appellee.

In an effort to obviate the effect of these decisions, and the dicta of the *Hahn* case, appellant states in his opening brief at pages 29-31 that other parties besides himself may be hurt if the decision of the Court below is affirmed. He points out that the Act provides a ceiling on the amount of benefits payable on account of any one wage earner. He then envisions the following situation which might come to pass if appellee's contentions here are allowed: A widowed mother is receiving "mother's insurance benefits" under Section 202(g) of the Act, and her several children are receiving "child's insurance benefits" under Section 202(d). The mother remarries. Her benefits are terminated, and the benefits of her children under Sec-

tion 202(d) are correspondingly increased. The mother then has her voidable remarriage annulled, and because the mother is reinstated to her benefits and there is a maximum amount payable on account of one wage earner, the benefits to the children are thus reduced. Appellant concludes, therefore, that the children as innocent third parties have been prejudiced.

The answer to this argument is that after the mother is reinstated the children's benefits are reduced *only* down to the amount they were receiving before their mother's remarriage—an amount which Congress deems adequate for children in their position at the time their mother is first widowed, and which certainly should remain adequate when all the parties, the mother and her children, are restored to the situation as it was before the mother's remarriage.

It must be noted here that appellant's solicitude for the rights of children does not extend to the situation where a minor, whose "child's insurance benefits" under Section 202(d) of the Act are terminated because of the child's marriage, has that voidable marriage annulled on the grounds of his or her minority. State laws uniformly and humanely protect children from the mistakes of a too youthful marriage, but appellant would not have this protection applied by the Federal Government. He would cut them off from Social Security benefits completely. *Mays v. Folsom*, supra. The decision by the Court on this appeal may well have conclusive bearing on such a situation in addition to the one here.

V.

POLICY CONSIDERATIONS AND LIBERAL CONSTRUCTION OF THE ACT REQUIRE THAT PLAINTIFF'S BENEFITS BE RE-INSTATED AND THE DECISIONS OF THE COURT BELOW BE AFFIRMED.

Any discussion of the effect of policy considerations on this appeal should begin with the statement that this is a case of first impression in the Federal Appellate Courts. Appellant concedes this at pages 9 and 32 of his opening brief, and appellee agrees with that statement. The decision of the Court here will, therefore, not only determine the effect of a widowed mother's annulment on the terminating event of remarriage under Section 202(g) of the Act. As said before, it may well be a conclusive precedent under Sections 202(d), (e), (f), and (h) of the Act, involving children, widows, widowers and parents, respectively, to say nothing of other Federal statutes, such as the Veteran's Act in *Hahn v. Gray*, supra. All of the above cited sections provide for benefits which end upon the marriage of the beneficiaries.

Appellant contends at pages 31 and 32 of his brief that the Court below misapplied the principle of liberal construction of welfare legislation, and in so doing disregarded the plain and unambiguous wording of the Act, namely that a mother's benefits end on her remarriage. This same plain and unambiguous statutory language has confronted the Courts before, and as has already been stated, they have consistently ruled that an annulled marriage is not such a marriage as to terminate benefits. (See the Workmen's Compensation cases previously cited herein, and par-

ticularly *Eureka Block Coal Co. v. Wells*, supra, and *Mays v. Folsom*, supra.) Admittedly, there is no ambiguity in the statement that a mother's remarriage ends her Social Security payments. The very question here, though, is whether appellee's second marriage was such a marriage within the meaning and intent of the Act. In this regard it is significant to note the opinion of the New York Court of Appeals in *Gaines v. Jacobsen*, supra, a case cited as authority by appellant with the facts identical to those of *Sefton v. Sefton*, supra. Despite the fact that they were construing the unambiguous word "remarry," not in a statute, but in a property settlement agreement, when no liberal construction was involved, and despite the fact that New York law, unlike California, allows permanent support payments to be awarded a wife seeking an annulment, the Court conceded that "resolution of the dispute may not be easy." (124 N.E. 2d at 293).

What appellant seeks here is to declare that the mere marriage ceremony in and of itself, even with an insane, impotent, or defrauding spouse is enough to end Social Security payments, no matter how innocently the marriage is entered into. Even a completely coerced marriage ceremony would end benefits, or a marriage when the parties were too young by law to understand their marital obligations. It is submitted that appellant's position does far more violence to the spirit and plain meaning of the Act than anything for which appellee contends.

Throughout this brief, many of the other policy considerations applicable to the problem before the

Court on this appeal have been discussed, particularly in those sections dealing with the rebuttal of appellant's main arguments. It would serve no purpose to extensively review these considerations here, but a brief summary of them may be in order.

The purpose of "mother's insurance benefits" provided for in Section 202(g) of the Act (formerly Section 202(e)) is to enable the widow of a deceased wage earner, who is also the mother of the wage earner's child, to remain at home and care for the child, or at least to assume parental responsibility for the welfare and care of the child if she and the child do not live in the same house. These benefits are designed to relieve the mother of financial stress so that she may give to her child a mother's watchful attention and not be forced to seek employment away from home. *Newsom v. Social Security Board*, supra, (70 F. Supp. at 964-965).

The above situation is precisely what appellee and her child found themselves in from October, 1952, to June, 1954, and to carry out the purpose of the Act appellant awarded appellee "mother's insurance benefits" under Section 202(g). Two years after they began, these benefits were terminated, as all parties concerned believed that appellee through her second "marriage" had acquired other means of support to enable her to care for her daughter. The intolerable nature of this second "marriage" into which appellee had entered is recognized by Section 82 of the California Civil Code, and, accordingly, appellee sought and received an annulment of it. She could not re-

ceive permanent support money from her second "husband" under the California law of annulment. *Millar v. Millar*, supra.

Thus, appellee and her child were placed in the same situation they had formerly been in, with their need just as great as when appellant had awarded her benefits before her second marriage ceremony, and the purposes of the Act just as well to be served through aid given them.

It can not be said that any single individual was misled to his or her financial prejudice by appellee's second ceremony of marriage in the sense that funds were recommitted elsewhere which cannot without sacrifice be withdrawn to pay appellee. Appellee's first husband is dead, and should she be reinstated to her "mother's insurance benefits" the burden of paying these benefits would fall on the Federal Old Age and Survivor's Insurance Trust Funds.

Whatever funds were available to appellant before appellee's remarriage are still available to him. Even if many other beneficiaries are reinstated as a result of the precedent of this decision appellant will be forced to pay only what funds were already committed to these people before they entered into a marriage marred by some element of invalidity. It cannot be said that the Federal Old Age and Survivor's Insurance Trust Fund, which is financed by taxes, is in any way comparable to a divorced private individual who might be severely prejudiced if he were not able to rely on his wife's remarriage to finally terminate his support obligations.

If appellee's second marriage had ended in a divorce, or in death, she would not dispute the fact that her "mother's insurance benefits" could not then be revived. She would then have had the right to seek support from her second husband or his estate. However, appellee's second "marriage" did not so end, and as the innocent party to an invalid marriage she exercised her right to have it annulled. Because of such a decree the right to support does not exist.

It is true, that if the lower Court is affirmed here, the problem will arise as to what to do in a state such as New York where alimony is allowed in an annulment action. While that question is not directly before the Court in this case, it is suggested that whether or not the beneficiary in New York is reinstated should be made to depend on whether she elects to receive support from her second husband.

Appellee submits that the lower Court in reaching its decision in this case, (138 F. Supp. 939), was guided not only by the law as it has consistently been applied in such a situation, but by sound considerations of policy.

CONCLUSION.

For all of the foregoing reasons it is submitted that the District Court was correct in holding that the appellee was entitled to reinstatement of mother's insurance benefits upon the annulment of her remarriage on the ground that it was a voidable marriage.

The judgment of the District Court should, therefore, be affirmed by this Court.

Dated, San Jose, California,
February 8, 1957.

Respectfully,

CHALMERS SMITH,

Attorney for Appellee.

No. 15,218

IN THE

United States Court of Appeals
For the Ninth Circuit

MARION B. FOLSOM, Secretary of the
Department of Health, Education,
and Welfare,

Appellant,

VS.

GRETTA N. PEARSALL,

Appellee.

On Appeal from the United States District Court for the
Northern District of California,
Southern Division.

REPLY BRIEF FOR THE APPELLANT.

LLOYD H. BURKE,
United States Attorney.

WILLIAM B. SPOHN,
Assistant United States Attorney,
Attorneys for the Appellant.

Of Counsel:

ARTHUR C. MILLER,
ELIZABETH M. DOYLE,
Attorneys, Department of Health,
Education, and Welfare.

FILED

APR - 1 1957

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Introductory Statement	1
Argument	2
I. The appellee's brief does not meet the appellant's point that the term "remarriage" in Section 202(g) of the Social Security Act is a Federal term and must be interpreted in the context of that Act	2
A. The appellee's brief fails to recognize that remarriage is a termination event and not a deduction event	2
B. The appellee's brief ignores the language of Federal law and construes a Federal term on the basis of state law to achieve an illogical conclusion	5
II. The appellee's brief improperly invokes policy considerations to avoid the plain meaning of the Act	10
Conclusion	17

Table of Authorities Cited

Cases	Pages
American Surety Co. v. Conner, 251 N.Y. 1, 9, 166 N.E. 783, 786, 65 A.L.R. 244	12
Callow v. Thomas, 322 Mass. 550, 78 N.E. 2d 637 (1948)....	11, 12
Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E. 2d 290 (1954) ..	12
Gorin v. United States, 111 F.2d 712 (9th Cir. 1940).....	16
Hahn v. Gray, 203 F.2d 625 (C.A.D.C. 1953)	9
Jay v. Boyd, 351 U.S. 345, 357 (1956)	16
Jerome v. United States, 318 U.S. 101, 104	5
Keeney v. Keeney, 211 La. 585, 30 So.2d 549 (1947).....	11
Mayers v. Ewing, 102 F. Supp. 201 (E.D. Penn. 1952).....	7
Mays v. Folsom, 143 F. Supp. 784 (Idaho 1956).....	7, 8, 9, 17, 18
Monerief v. Hobby, 133 F. Supp. 152, 158-9 (Md. 1955), aff'd sub nom. Monerief v. Folsom, 233 F.2d 471 (4th Cir. 1956)	4, 16
Newsom v. Social Security Board, 70 F. Supp. 962 (E.D. Mich. 1947)	15
N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944) ..	5
Pearce v. Folsom, unreported (N.D. Miss. 1956), reversing admin. decision reported in C.C.H. Unempl. Ins. Service, Fed. par. 8224	18
Price v. Price, 24 C.A. 2d 462, 75 P.2d 655 (1938)	14
Ray v. Social Security Board, 73 F. Supp. 58 (S.D. Ala. 1947)	7
Sefton v. Sefton, 45 C.2d 872, 291 P.2d 439 (1955)	11, 14
Stuart v. Hobby, 128 F. Supp. 609 (S.D.N.Y. 1955).....	7
Thompson v. United States, 246 U.S. 547 (1918)	16
United States et al. v. LaLone et al., 152 F.2d 43 (1945) ..	17
United States v. Silk, 331 U.S. 704 (1947)	15

Statutes

Social Security Act, as amended:	Pages
Section 202 (42 U.S.C.A. 402)	3, 18
Section 202(d)(1) (42 U.S.C.A. 402(d)(1))	2, 17
Section 202(e)(1) (42 U.S.C.A. 402(e)(1))	2
Section 202(f)(1) (42 U.S.C.A. 402(f)(1))	2
Section 202(g) (42 U.S.C.A. 402(g))....	2, 3, 6, 8, 11, 15, 17
Section 202(k)(1) (42 U.S.C.A. 402(k)(1)).....	2
Section 203(b) (42 U.S.C.A. 403(b))	3
Section 203(c) (42 U.S.C.A. 403(c))	3
1939 Amendments—53 Stat. 1360	4
California Civil Code:	
Section 86	14
Section 139	11

Miscellaneous

65 A.L.R. 244	12
Sen. Rep. No. 573, 74th Cong. 1st Sess. 2-4	5

No. 15,218

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARION B. FOLSOM, Secretary of the
Department of Health, Education,
and Welfare,

Appellant,

vs.

GRETTA N. PEARSALL,

Appellee.

On Appeal from the United States District Court for the
Northern District of California,
Southern Division.

REPLY BRIEF FOR THE APPELLANT.

INTRODUCTORY STATEMENT.

The opening brief for the appellant was based on four principal points of argument. The appellee's brief does not respond to those points in the same order nor under the same captions, and we are unable to identify specifically the portions of the appellee's brief wherein it may even undertake to respond to certain of the appellant's points. Moreover, the appellee's brief does not present any points which have not already been discussed in the appellant's opening brief. This reply will accordingly be limited

to showing the appellee's failure to meet the appellant's points and to correcting certain misstatements and fallacious reasoning in the appellee's brief.

ARGUMENT.

I.

THE APPELLEE'S BRIEF DOES NOT MEET THE APPELLANT'S POINT THAT THE TERM "REMARRIAGE" IN SECTION 202(g) OF THE SOCIAL SECURITY ACT IS A FEDERAL TERM AND MUST BE INTERPRETED IN THE CONTEXT OF THAT ACT.

A. The appellee's brief fails to recognize that remarriage is a termination event and not a deduction event.

The appellee's brief scarcely attempts a response to this point, although indicating (on page 19) that the appellee understands that the appellant is arguing that the term "remarries" appears only in Section 202(g) of the Act (42 U.S.C.A. 402(g)). However, the appellant's argument is rather that the very section of the Act which creates the benefits provides for their termination, by providing that such benefits *end* upon the occurrence of the events listed therein, including "she remarries." Similarly the sections of the Act creating entitlement to benefits for a widow (Sec. 202(e)(1)); a widower (Sec. 202(f)(1)); a child (Sec. 202(d)(1)); and a parent (Sec. 202(k)(1)) (42 U.S.C.A. 402(e)(1), (f)(1), (d)(1) and (k)(1)) respectively provide that benefits *end* when the beneficiary marries or remarries.

In each instance, the very section of the Act which creates the individual's entitlement to benefits provides the specific events on the happening of which

the benefits end. Under the appellee's contention, the "ending" of benefits upon "remarriage" would be in legal effect, merely a *suspension* of benefits, subject to lifting of the suspension upon procurement of an annulment of the remarriage. Yet Congress expressly provided for the "ending" of the benefits upon "remarriage" of the beneficiary, while it provided in a different section of the Act (Sec. 203(b) and (c)) (42 U.S.C.A. 403(b) and (c)) for deductions from benefits *during* the months in which certain other circumstances exist. E.g., receipt of earnings in excess of the specified amount, and failure of the widow or former wife divorced of the wage earner to have his child in her care. Section 203(b) and (c) therefore provides, by way of deductions, for *suspension* of benefits during certain months, in direct contrast to Section 202 which not only creates the rights to monthly benefits but also provides for the *ending* of the benefits.

The appellee's brief urges on pages 19 and 20 that remarriage differs from the other termination events specified in Section 202(g), *supra*, since a marriage may be undone, but death or attainment of a specified age is a final act which cannot be undone. The very fact that Congress classed remarriage with death and attainment of age is in our opinion evidence that Congress did not view remarriage as a less final act than death or attainment of age insofar as its effect on entitlement to benefits is concerned.

To argue—as on pages 20 and 21 of the appellee's brief—that Congress could have provided expressly

that benefits would not be reinstated upon the annulment of a voidable marriage, is merely to grasp at straws. Congress said that benefits end when the beneficiary remarries and we submit that no more explicit and adequate term than "end" could have been employed.

The appellee's brief suggests on page 21 that the annulment situation was not contemplated by Congress. If this were so, it would hardly warrant amendment by judicial legislation in violation of the well-settled rule that:

"* * * where the language of the statute is plain and unambiguous and does not result in absurd or obviously unintended results, courts are not at liberty to make substitution in language to meet the supposed equity of a particular case." *Moncrief v. Hobby*, 133 F. Supp. 152, 158-9 (Md. 1955), aff'd sub nom. *Moncrief v. Folsom*, 233 F. 2d 471 (4th Cir. 1956) and cited on pages 31 and 32 of the appellant's opening brief.

Extended and expert consideration was given to the drafting and enactment of the Social Security Act, and to the extensive Amendments of 1939 (53 Stat. 1360 et seq.) which created the several categories of monthly benefits. It is therefore improbable that the framers of this important and nation-wide legislation did not realize that not all marriages end in death or divorce and that many marriages, some void and others voidable, are annulled.

- B. The appellee's brief ignores the language of Federal law and construes a Federal term on the basis of state law to achieve an illogical conclusion.**

The appellee's response to this point appears to be set forth on pages 6-13 inclusive of the appellee's brief. The most significant aspect of the appellee's argument is its failure to respond to the appellant's contention that once it has been determined under applicable state law that a marriage is voidable, the effect of annulment of such marriage under the terms of the Act is a question of Federal, and not state, law. See the appellant's opening brief at page 16. Nowhere does the appellee recognize the decision of the Supreme Court in *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), wherein the following cogent statement appears at page 123:

"Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. e.g., Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4. It is an Act, therefore, in reference to which it is not only proper, but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law.' *Jerome v. United States*, 318 U.S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or

that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.”

So, too, in the Social Security Act, we submit that in the absence of clear Congressional directive, the interpretation of the term “remarries” in Section 202(g), *supra*, is not to be varied from state to state and this Act, too, is not “to be administered in accordance with whatever different standards the respective states may see fit to adopt * * *”.

Whether or not an annulment of a voidable remarriage has the effect of reviving a right to benefits under the Act, which had ended upon entering into the remarriage, is a question which calls for the same, nation-wide answer. Congress never intended that the answer to this question should vary from case to case, depending upon either the law of the state in which the remarriage was contracted or the law of the state where it was annulled.

The appellee’s response to the appellant’s argument that the term “remarries” is a Federal term is a discussion of state court decisions. E.g., the following statement on page 8 of the appellee’s brief:

“Indeed, when the precise question presented on this appeal has arisen before for decision the courts have consistently rejected the position of appellant, have applied the doctrine of annulment ‘relating back,’ and have reinstated persons in appellee’s position to the benefits they were receiving before the marriage in question.”

In support thereof, the appellee cites the same four Workmen's Compensation cases which were cited by the Court below and which are discussed on pages 19 and 20 of the opening brief, and the recent decision in *Mays v. Folsom*, 143 F. Supp. 784 (Idaho 1956), which is discussed below. The precise question presented to this Court, however, has not heretofore been presented to any state or Federal court. As pointed out in the opening brief at pages 19 and 20, the state court decisions in Workmen's Compensation cases do not present the same question, since the Workmen's Compensation laws not only differ in their provisions but differ also from the Social Security Act.

Moreover, as shown at pages 19 and 20 of the opening brief, entitlement to Workmen's Compensation is related primarily to *dependency* rather than to *status*. The appellee's brief attempts (at page 10) to discredit this distinction by citing dicta in two Federal district court decisions to the effect that the Social Security Act was designed to relieve hardship on dependents. We certainly do not deny that such was one of the purposes of the Act—but point out that the purpose can only be accomplished within the provisions of the Act. The appellee's first citation—*Ray v. Social Security Board*, 73 F. Supp. 58 (S.D. Ala. 1947)—was based on certain peculiarities of local law. This was noted in the later decision in *Mayers v. Ewing*, 102 F. Supp. 201 (E.D. Penn. 1952), particularly at page 203. The appellee's second citation—*Stuart v. Hobby*, 128 F. Supp. 609 (S.D.N.Y. 1955)—upheld

the administrative denial of widow's insurance benefits to the plaintiff on the ground that she did not qualify therefor under the terms of the Act as interpreted by the predecessor of the present appellant. We accordingly submit that neither decision cited by the appellee should cause this Court to disturb the administrative action in the present case by affirming the decision here on appeal.

The analogy which the appellee attempts between state Workmen's Compensation statutes and the Federal Social Security Act, all of a beneficent nature, would be valid only if the language and the statutory purposes were the same or very similar. However, there is no marked similarity of the language of the several state statutes to that of the Social Security Act. Even if the language were identical, the interpretation of state statutes by state courts, unless so uniform as to have given to the term in question a well recognized meaning which Congress must be presumed to have had in mind at the time the Federal law was enacted, can be of little value in interpreting the Federal statute. We submit that the four cases cited by the appellee construing and applying the non-uniform statutes of Indiana, Arizona, Tennessee and North Dakota, cannot possibly be said to have given to the term "remarries" such a uniform and widely recognized meaning that Congress must be deemed to have had that meaning in mind when it enacted Section 202(g) of the Social Security Act, *supra*.

The *Mays* case cited by the appellee presents the closest parallel to the present case since it construes

the term “marries” as used by Congress in Section 202(d) of the Act, *supra*. It should be noted, however, that the *Mays* case relies heavily on the decision of the Court below in the present case, and cannot properly be regarded as authority in support of the decision here on appeal.

The discussion of *Hahn v. Gray*, 203 F. 2d 625 (C.A.D.C. 1953) on pages 14 to 16 of the appellee’s brief is apparently also addressed to the appellant’s point I-B. We urge again that the language of that decision dealing with the annulment is not simply dicta but is one of the grounds of the decision. Even the excerpt from the *Hahn* decision quoted at page 15 of the appellee’s brief shows that the main basis of the court’s holding that Mrs. Hahn “was no longer the unremarried widow of a veteran and was properly denied restoration to the pension rolls,” was the fact that, under the New York law, as said by the court, “marriages induced by fraud, are merely voidable, and are valid for all purposes until judicially declared void.”

Although the decree of annulment in the *Hahn* case did not expressly purport to be an annulment of the marriage *ab initio*, nevertheless the presence or the absence of such decretal language is not a valid distinction since, as conceded at page 16 of the appellee’s brief, in New York, in accordance with the general rule, a decree of annulment of a voidable marriage is *ab initio* regardless of whether or not the decree so specifies. Nor can the *Hahn* case be distinguished on the ground that the decree did not be-

come effective until three months afterward, since at the conclusion of that period, the decree rendered the marriage void *ab initio*. It does not follow—as the appellee here contends—from the fact that the Court of Appeals for the District of Columbia quoted from the language of the New York decree of annulment, that had it contained the superfluous *ab initio* language—or had it been effective upon rendition—the Court of Appeals would have reached a different conclusion as to the restoration of Mrs. Hahn’s pension from the Veterans’ Administration.

II.

THE APPELLEE’S BRIEF IMPROPERLY INVOKES POLICY CONSIDERATIONS TO AVOID THE PLAIN MEANING OF THE ACT.

Aside from the matters discussed above, the appellee’s brief is devoted to a presentation of policy considerations to justify the interpretation by the Court below of state court decisions and the application of those decisions, so interpreted, to the present case. The appellee’s contentions seem to be that the limitations on the application of the fiction of “relation back” of an annulment decree are applicable (1) only where the term “remarry” appears in an agreement between private parties such as a property settlement agreement, and (2) only where the spouse whose second marriage is annulled is fully protected by some provision for her maintenance by her second spouse. We submit that neither the cases here-

tofore cited and discussed nor any other cases support such contentions.

The appellee also seems to have overlooked the fact that two of the cases cited in the appellant's main brief—namely, *Sefton v. Sefton*, 45 C.2d 872, 291 P.2d 439 (1955), and *Keeney v. Keeney*, 211 La. 585, 30 So. 2d 549 (1947)—involved the question of the effect of an annulment on the terms “remarriage” or “marriage”, appearing in a statute rather than in an agreement. Thus, *Sefton* involved the interpretation of the term “remarriage” in Section 139 of the California Civil Code, and *Keeney* interpreted the term “marriage” as used in Article 160 of the Louisiana Civil Code.

A basic fallacy of the appellee's argument appears to be the failure to realize that in construing the meaning of the terms “ending” and “remarries”, as used in Section 202(g)(1) of the Act, the Federal courts are not confronted with a situation calling for a balancing of equities, as state courts sometimes are in determining what effect should be given to the fiction of “relation back” of a decree of annulment, but rather with a question of applying the plain terms of a Federal statute in a case in which a marriage legally and factually existed until annulled.

In this regard, the following excerpt from the decision in *Callow v. Thomas*, 322 Mass. 550, 78 N.E. 2d 637 (1948), is noteworthy:

“While it doubtless is true that a decree of nullity ordinarily has the effect of making a marriage, even one which is voidable, void ab initio, this is

a legal fiction which ought not to be pressed too far. To say that for all purposes the marriage never existed is unrealistic. Logic must yield to realities. Public policy requires that there must be some limits to the retroactive effects of a decree of annulment. It was said by Cardozo, C.J., in *American Surety Co. v. Conner*, 251 N.Y. 1, 9, 166 N.E. 783, 786, 65 A.L.R. 244, 'The decree of annulment destroyed the marriage from the beginning as a source of rights and duties * * * but it could not obliterate the past and make events unreal.' The better rule, we think, is that in the case of a voidable marriage transactions which have been concluded and things which have been done during the period of the supposed marriage ought not to be undone or reopened after the decree of annulment."

Within such "better rule" of the Massachusetts court in the *Callow* case and of the New York Court of Appeals in *Gaines v. Jacobsen*, 308 N.Y. 218, 124 N.E. 2d 290 (1954), discussed on pages 20 and 21 of the appellant's opening brief, it seems clear that in the case of the voidable remarriage which had the effect of ending the appellee's entitlement to benefits as unremarried widow of Delbert L. Pearsall, the ending of benefits "ought not to be undone or reopened after the decree of annulment."

Surely, whether or not the divorced spouse who contracts a voidable marriage can, after the annulment of that marriage, secure support from her second spouse cannot have any bearing on the interpretation of the term "remarry" in the Act. By the appellee's argument, however, the results in each case—even

where the facts were substantially similar—would vary from state to state, depending on the particular local law. Moreover, under the appellee's contention, a woman having grounds for divorce or for annulment of a voidable remarriage—one which could not be annulled at the election of the husband—could, in weighing the advantages and the disadvantages of electing to sue for annulment instead of divorce, be influenced by the expected reinstatement of benefits under the Act, and the amount of such benefits, in deciding whether to sue for annulment or for divorce. We submit that such a construction of the applicable provisions of the Social Security Act, potentially influencing the procurement of annulments of voidable marriages for pecuniary reasons and at the expense of the Federal Old-Age and Survivors Insurance Trust Fund, and, in some cases, at the expense of other beneficiaries, would be contrary to public policy, as well as to the Congressional intention clearly expressed by the statutory provision for the “ending” rather than the suspension of benefits with the month preceding the month in which the widow “remarries”.

The appellee's brief also urges on pages 21 to 25 that no one would be materially prejudiced by the reinstatement of her benefits. In response, we should first correct the appellee's statement of our point as set forth on page 21 of appellee's brief. We do not argue that the doctrine of “relation back” should never be applied to third parties so as to affect their rights. Such a broad argument is obviously not required by the issues in the present case. We do urge, however,

that Section 86 of the California Civil Code and the decisions in *Price v. Price*, 24 C.A. 2d 462, 75 P. 2d 655 (1938), and *Sefton v. Sefton*, *supra*, show clearly that the application of that fictional doctrine in the instant case to achieve the appellee's reinstatement to benefit status is in no way supported by the law of California upon which the appellee relies, and that the Court below should not have resorted to "policy considerations" to minimize the cogency of the appellant's citation of these statutory and case authorities. Not only is there no room for policy considerations where the statutory language is clear, but we submit that the Court below relied on policy considerations which are incomplete and reflect only a portion of the total picture. The appellant's opening brief shows at pages 27-31 how "liberality" in the interpretation of the Social Security Act in determining the rights of one in the appellee's position may well be illiberal toward some persons and to the financial disadvantage of other equally if not more innocent persons who are also beneficiaries of the Act. Certainly the interpretation of the Court below prejudices the appellant who is charged by Congress with the administration of the Social Security Act.

The appellee's brief asserts on page 10 that "Federal decisions enunciating the purpose of the Act have stressed the element of relieving hardship on dependents as that for which the Act was designed." While an underlying purpose of "survivors insurance benefits" is to replace a loss of support presumably suffered by the death of the "insured individual" (the

wage earner), there is nothing in the Act which makes any of the various categories of "survivors insurance benefits" in any way dependent upon the financial condition or the need or lack of need of a claimant for any benefits. We have already discussed this assertion under I-B above.

The suggestion on page 23 of the appellee's brief that she and her child are being penalized for her innocent action is unsound. Not only do the "child's insurance benefits" continue notwithstanding the termination of the "mother's insurance benefits", but the termination of the latter benefits is clearly not a "penalty", since it is required by Section 202(g), *supra*, of the Act itself which limits the period of such benefits to the month preceding the month in which the beneficiary "remarries".

In support of its contention that the Act is to be liberally interpreted, appellee's brief cites (at pages 10 and 17) *United States v. Silk*, 331 U.S. 704 (1947). Certainly we do not quarrel with the doctrine there enunciated by the Supreme Court to the effect that the Social Security Act is to be liberally construed, but the appellant would point out that this decision itself on page 714 clearly recognizes that the court is not free to reach its decision without regard to the provisions of the Act. So, too, in *Newsom v. Social Security Board*, 70 F. Supp. 962 (E.D. Mich. 1947), which is cited at pages 17, 23 and 28 of the appellee's brief, the court recognized the beneficent purpose of the Act but upheld the decision of the Board (one of the administrative predecessors of the present appellant) in denying benefits to the plaintiff as mother of a child

because she did not come within the entitlement provisions of the Act.

We believe that we have sufficiently demonstrated in the opening brief—at pages 25-31—and hereinabove, that although the Social Security Act is a beneficent statute and as such is entitled to liberal interpretation, the policy arguments which are made by the appellee should properly be presented to Congress and not to the courts. We would only add that the suggestion on page 20 of the appellee's brief, that this Court should not be deterred from ruling that the appellee is entitled to reinstatement of benefits by the failure of Congress to provide for such reinstatement because "Federal and State statutes are constantly being interpreted by the courts in order to ascertain * * * what policy considerations dictate * * *" is a direct invitation to judicial legislation. However, as the decision in *Moncrief v. Hobby*, supra, clearly points out, a court is not at liberty to alter the legislative language to meet the supposed equity of a particular case. This is true even if the application of the statute as written produces harsh results. E.g., *Jay v. Boyd*, 351 U.S. 345, 357 (1956). Where the Congressional language expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction and conjecture. E.g., *Thompson v. United States*, 246 U.S. 547 (1918); *Gorin v. United States*, 111 F. 2d 712 (9th Cir. 1940).

The appellee's brief, while urging this Court to interpret the Act as "policy considerations dictate"—and as the appellee conceives those policy considera-

tions to be—ignores the well established rule that the interpretation of a law by the agency to which Congress has entrusted its administration should be given serious consideration by the courts. The appellee's brief attempts no response to the discussion of this point on pages 32 to 34 of the appellant's opening brief, nor to the cases cited therein. E.g., the decision of this Court under the Social Security Act in *United States et al. v. LaLone et al.*, 152 F. 2d 43 (1945).

We submit that the appellant's interpretation of the term "remarries" is entirely consistent with the Act and is therefore entitled to acceptance by this Court.

CONCLUSION.

We pointed out at page 32 of the opening brief, that this is a case of first impression. Its importance is demonstrated by the fact that since the decision of the Court below, there have been two other decisions by Federal district courts on closely similar issues. *Mays v. Folsom*, 143 F. Supp. 784 (Idaho 1956), cited by the appellee and discussed hereinabove, concerned the termination of child's insurance benefits granted pursuant to Section 202(d) of the Act, *supra*, and mother's insurance benefits granted pursuant to Section 202(g), also *supra*. Section 202(d) provides that a child's benefits shall end with the month preceding the first month in which such child marries, and Section 202(g) provides that the mother's insurance benefits end with the month preceding the month in which

no child of the deceased individual is entitled to child's insurance benefits. The sixteen-year-old child in the *Mays* case was receiving child's insurance benefits when she married. Such benefits were terminated because of her marriage and the mother's benefits were terminated because there was no longer a child entitled to benefits. Because of the child's age, her marriage was voidable and was annulled. The child's mother thereupon demanded that both the child and she be restored to benefit status. The district court ordered reinstatement and in so doing relied upon the decision now on appeal herein.

In the unreported case of *Pearce v. Folsom*, decided November 9, 1956 by the United States District Court for the Northern District of Mississippi, Delta Division, Civil Action No. 645, the court reversed the appellant's decision which is reported in C.C.H. Unemployment Insurance Service, Fed. ¶ 8224, that the plaintiff was not entitled to reinstatement of widow's insurance benefits upon annulment of her voidable remarriage. The appellant has requested an appeal in the *Pearce* case. Five additional cases are now pending in other Federal district courts, and several others are pending before referees of the Department of Health, Education, and Welfare, all involving the termination provisions of Section 202 of the Act, *supra*.

The present case is therefore an important one to the appellant and will certainly be regarded as a precedent in other circuits. For the reasons stated herein, as well as in the appellant's opening brief, we submit

that the decision of the Court below is in error and should be reversed by this Court.

Respectfully,

LLOYD H. BURKE,

United States Attorney,

WILLIAM B. SPOHN,

Assistant United States Attorney,

Attorneys for the Appellant.

Of Counsel:

ARTHUR C. MILLER,

ELIZABETH M. DOYLE,

Attorneys, Department of Health,

Education, and Welfare.

March, 1957.

No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington.
Northern Division.

FILED
DEC - 3 1956
J. P. O'BRIEN, CLERK

No. 15219

**United States
Court of Appeals**
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington,
Northern Division.

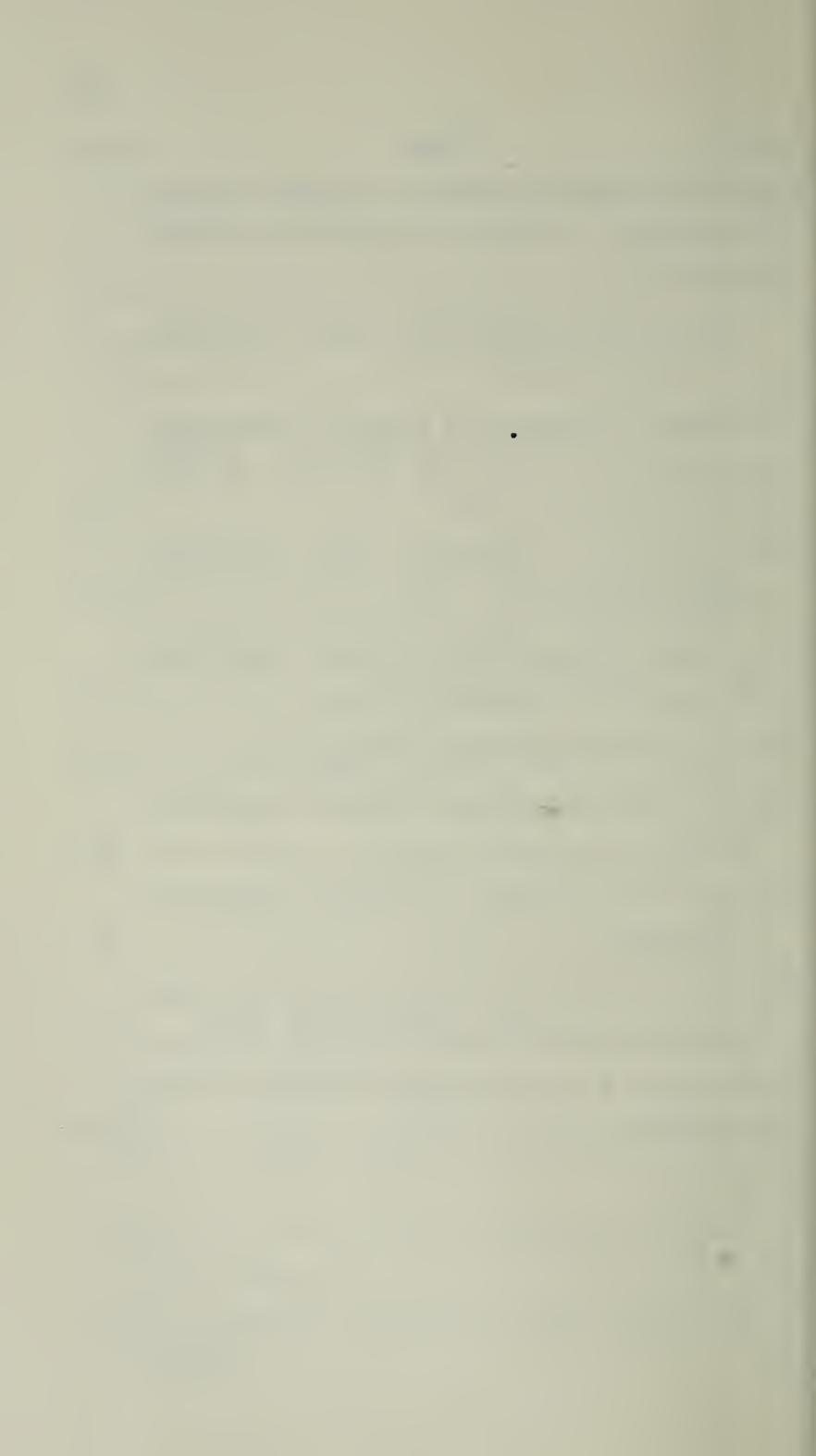
INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer of Century Investment Corporation...	36
Answer of Defendants Ester.....	24
Answer of Defendants Pague.....	33
Answer, Defenses, etc., of Defendants Barnett and Owens	39
Appeal:	
Bond on.....	121, 124
Certificate of Clerk on.....	126, 139
Notice of	120
Statement of Points on.....	141, 143
Attorneys, Names and Addresses of.....	1
Bond on Appeal by Barnett and Owens.....	121
Bond on Appeal by Ester.....	124
Certificate of Clerk to Record on Appeal Dated July 31, 1956.....	126
Certificate of Clerk to Record on Appeal Dated August 22, 1956.....	139
Complaint	3
Ex. A—Invitation to Bid.....	10
B—General Conditions	13
C—Offer and Acceptance of Offer....	19

INDEX	PAGE
Exceptions of Pague to Supplemental Report of Special Master.....	91
Findings of Fact and Conclusions of Law.....	62
Findings of Fact and Conclusions of Law, Pro- posed	60
Findings of Fact and Conclusions of Law, Sup- plemental	107
Judgment and Decree.....	114
Minute Entry June 4, 1956—Hearing on Motion of Barnett, Owens and Ester and Court's Own Motion Amending Judgment and Order Denying All Pending Motions.....	119
Minute Entry August 14, 1956—Order Dismiss- ing Appeal, etc.....	142
Motion to Alter or Amend Judgment and De- cree	118
Motion of Barnett and Owens to Dismiss Com- plaint	22
Motion of Defendants Ester to Dismiss Com- plaint	23
Motion of Pague to Strike Supplemental Re- port of Special Master.....	95
Notice of Appeal by Pague and Century Invest- ment Corporation	120
Notice of Appeal by Barnett, Owens and Ester, Amended	120

INDEX	PAGE
Objections of Barnett, Owens and Ester to Special Master's Reports, Supplemental (Portions of)	97
Ex. J—Comparative Statement of Income and Expense	105
Objections of Pague and Century Investment Corporation to Proposed Findings of Fact and Conclusions of Law.....	57
Order Directing Reference and Appointing Special Master	82
Order Discharging Rule to Show Cause and Denying Motions to Dismiss.....	48
Report of Special Master (Portion of).....	84
Report of Special Master, Supplemental (Portion of)	85
Request for Admissions, Century Investment Corporation	51
Statement of Points on Appeal of Century Investment Corporation and Virgil J. Pague..	141
Statement of Points on Appeal by Ester, Owens and Barnett	143



NAMES AND ADDRESSES OF ATTORNEYS

LYCETTE, DIAMOND and SYLVESTER, and
LYLE L. IVERSON,
800 Hoge Building,
Seattle, Wash.,

For Appellants Century Investment Corp.,
and Virgil J. Pague.

ARTHUR G. BARNETT,
1304 Northern Life Tower,
Seattle, Washington;

ALEC DUFF,
1155 Dexter Horton Bldg.,
Seattle, Washington,

For Appellants Barnett and Owens.

VERNON W. TOWNE,
1304 Northern Life Tower,
Seattle, Washington,

For Appellant Ester.

CHARLES P. MORIARTY,
U. S. Attorney,

JOHN A. ROBERTS, JR.,
Asst. U. S. Attorney,
United States Courthouse,
Seattle, Washington,

For Appellee United States of
America.

United States District Court, Western District
of Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a
Corporation; HARTFORD ACCIDENT & IN-
DEMNITY COMPANY, a Corporation; A. E.
SHERMAN and JANE DOE SHERMAN, His
Wife; VIRGIL J. PAGUE and JANE DOE
PAGUE, His Wife; CARL W. PAGUE and
JANE DOE PAGUE, His Wife; ARTHUR G.
BARNETT and JANE DOE BARNETT, His
Wife; EDWARD R. ESTER and JANE DOE
ESTER, His Wife; and DONALD F. OWENS
and JANE DOE OWENS, His Wife,

Defendants.

COMPLAINT

I.

The defendants Century Investment Corporation and Hartford Accident & Indemnity Company, are corporations and have a principal place of business and a resident agent within the Northern Division of the Western District of Washington. That all other defendants are residents of the Northern Division of the Western District of Washington. Jurisdiction is based on Title 28, U.S.C. Section 1345.

II.

That on or about July 14, 1953, the defendants, A. E. Sherman, Virgil J. Pague and Century Investment Corporation, entered into a contract in writing with the Director of the Public Housing Administration, an agency and department of the United States of America, and representing the United States of America, said contract being comprised of three separate documents which are the Invitation to Bid, attached hereto and marked Exhibit "A"; the General Conditions, attached hereto and marked Exhibit "B"; and the Offer and Acceptance of Offer, attached hereto and marked Exhibit "C"; all of which documents are by this reference incorporated herein as though fully set forth.

III.

That paragraph 2, beginning on page 1 of the Offer and Acceptance of Offer of said contract, Exhibit C, provides as follows:

"The Purchaser offers and agrees to purchase from the seller and to remove the property set forth and described in attachment A, attached to the Invitation to Bid and General Conditions, and to clean the building site or sites, such offer being governed by and subject to the General Conditions covering the sale of such property at the purchase price as listed by the Purchaser on Attachment A."

That paragraph 2, beginning on page 1 of the General Conditions of said Contract, Exhibit B, provides as follows:

“* * * The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. * * *”

That paragraph 6, beginning on page 2 of the General Conditions of said Contract, Exhibit B, provides as follows:

“* * * and shall complete the removal of the buildings or structures and all clean-up operations within a reasonable period not to exceed the period of time specified in paragraph 3 of the Invitation to Bid. In the event the purchaser fails to complete the removal and clean-up operations within such period of time, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwellings and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed.”

That paragraph 3, beginning on page 1 of the Invitation to Bid of said Contract, Exhibit A, provides as follows:

“Purchaser will provide the Housing Authority of the City of Seattle with a Performance Bond in accordance with the following schedule:

“No. of Sales Units Purchased: 3 sales units and over.

“Amount of Bond: \$5,000.00.

“Time Allowed for Completion of Work: 120 days from acceptance of offer.

“* * *”

IV.

That the completion date for the removal of said temporary buildings under the terms of the contract was not later than November 2, 1953. That said temporary buildings and the real property upon which they are presently situated are located in the City of Seattle, County of King, State of Washington, and more particularly described as follows:

Building #102, located at 6500 Maynard Avenue, Seattle, on Lots 2, 3, 4, 5, 6 and 34, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle;

Building #103, located at 6528 Sixth Avenue South, Seattle, on the South 35 feet of Lot 10, all of lots 11, 13, 14, 30 and 31, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle;

Building #104, located at 6542 Sixth Avenue South, Seattle, on Lots 15, 16, 17, 18 and parts of 19, 20 and 23, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle;

Building #105, located at 6361 Maynard Avenue, Seattle, on Lots 21, 22 and parts of Lots 19, 20 and

23, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle.

V.

That on July 14, 1953, a Performance Bond in the sum of \$5,000.00 was executed by Century Investment Corporation, through Virgil J. Pague, its President, as principal, and by the Hartford Accident and Indemnity Company, as surety, in favor of the Housing Authority, City of Seattle, Washington, acting as the agent of the Public Housing Administration, to insure the condition that the obligation of the Century Investment Corporation that it would do all the work and furnish all the materials for the removal of buildings and site clearance and faithfully perform all the conditions of said contract.

VI.

That the defendants, A. E. Sherman, Virgil J. Pague, Arthur G. Barnett, Carl W. Pague, Donald F. Owens and Edward R. Ester, acting individually and in behalf of the marital communities composed of themselves and their wives, purchased said temporary buildings from the Century Investment Corporation, and in open and flagrant violation of the terms of said contract, have rented or leased certain dwellings and apartments located in said temporary buildings, contrary to the terms and conditions of said contract.

VII.

That the defendant, A. E. Sherman, asserts or claims some right, title and interest in and to said

property adverse to the claim of the other defendants here in and adverse to the rights of the United States in and to said property, which claim of lien or interest is subordinate to that of the plaintiff herein.

VIII.

That the plaintiff, United States of America, at all times herein mentioned, had and does now have exclusive use of said real property upon which said temporary dwellings are presently located and the acts of the defendants alleged herein have damaged and are damaging the plaintiff's exclusive use of said land and are in flagrant violation of the laws of the United States of America relating to temporary war housing.

IX.

That the defendants, and each of them, knowingly acted in direct violation of paragraph 8, beginning on page 2 of the General Conditions of said Contract, Exhibit B, which provides as follows:

“Assignment. Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15.)”

Wherefore, plaintiff, United States of America, prays for judgment against the defendants, and each of them, and marital communities composed of them, as follows:

1. Require the Century Investment Corporation and its surety, Hartford Accident & Indemnity Com-

pany to affirmatively and forthwith remove the temporary buildings in accordance with the terms of the removal contract and the mandatory requirement of the Lanham Act.

2. Restrain and enjoin any and all parties from interfering with the plaintiff's interest in the personal and real property and the temporary buildings located thereon.

3. Allow damages to the plaintiff for the failure of the Century Investment Corporation to complete its removal contract by November 2, 1953, and requiring the plaintiff to extend its term of exclusive use of said property from February 21, 1954, to February 20, 1955.

4. An accounting by all parties of the funds collected by said defendants from tenants or from other sources by reason of the unauthorized use of said temporary buildings and the land upon which they are situated.

5. Allow a reasonable rental value to the plaintiff for said property by reason of the use of said property by the defendants herein.

6. That the title of the defendants to said temporary buildings be forfeited and that the plaintiff, United States of America, shall have the full and complete title to said temporary buildings, free and clear from any and all charges, interest, claims, liens and encumbrances of any kind whatsoever.

7. For such other and further relief as to the court may seem just and equitable and for its costs and disbursements herein to be taxed.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ RICHARD J. HARRIS,
Assistant United States
Attorney,

/s/ JOHN A. ROBERTS, JR.,
Assistant United States
Attorney.

EXHIBIT "A"

Housing and Home Finance Agency
Public Housing Administration

Invitation to Bid

Sale and Removal of Buildings and Site Clearance

Project No.: WASH-45302.

Location: Michigan St., between
4th Ave. South &
Maynard Avenue,
Seattle, Washington.

1. By notice first published on May 21, 1953, the United States of America, acting through the Public Housing Administration of the Housing and

Home Finance Agency and the Housing Authority of the City of Seattle, Washington, has offered to sell for off-site removal the property as follows and hereinafter listed on Attachment A.

24—1 story apartment-type buildings, containing 144—1 bedroom units, offered in 10 sales units, each including a concrete and tile service unit.

The dwelling units are of frame construction, all one-story, with mineral surface siding exteriors on 2"x4". studs, wallboard interior walls, single fir floors over 2"x6" joists—16" o.c., solid roofs built up over 2"x6" rafters—16" o.c., and concrete foundation piers. Most units contain electric hot plate, ice-box, single sink, shower stall, toilet bowl and tank, and wash basin. Certain items of dwelling furniture will be included with some of the units.

Equipment in the service buildings includes converted oil-burning furnace, hot water heater and storage tank, and fuel tank.

Condition of buildings and contents is "where is, as is," except for plywood covers over windows and doors, which are not included in the sale.

Each sales unit is offered separately and purchasers may remove from the site in any feasible manner, either intact or as salvage material.

Arrangements to inspect vacant buildings may be made by telephoning the Manager at Lander 2600, Mondays through Fridays, between the hours of

9:00 a.m. and 4:00 p.m., or calling at the project office, 225 Juneau Street.

2. Sealed bids in duplicate must be submitted not later than the time scheduled below for the bid opening. Bids shall be enclosed in two envelopes (outer and inner), both of which shall be sealed and clearly marked "Bid for Purchase and Removal" and addressed to the Housing Authority of the City of Seattle, 825 Yesler Way, Seattle 4, Washington. Other information pertaining to this offering may be secured from the Housing Authority of the City of Seattle.

Bids Will Be Publicly Opened at the Above Address
at 2:00 P.M. on June 23, 1953

3. Purchaser will provide the Housing Authority of the City of Seattle with a Performance Bond in accordance with the following schedule:

No. of Sales Units Purchased: Up to 2 sales units.

No. of Sales Units Purchased: 3 sales units and over.

Amount of Bond: \$300.00 per sales unit.

Amount of Bond: \$5,000.00.

Time Allowed for Completion of Work: 75 days from acceptance of offer.

Time Allowed for Completion of Work: 120 days from acceptance of offer.

as required under Paragraph 2 of the General Conditions.

4. All offers except those from Federal, state or local government bodies shall be accompanied by a deposit securing the offer. Said deposit shall be in the form of a certified or cashier's check or money order payable to the Housing Authority of the City of Seattle and shall be in the amount of five per cent (5%) of the bid up to \$10,000 and two per cent (2%) of any amount in excess of \$10,000. The amount of the deposits made by successful bidders in accordance with this paragraph shall be applied against the purchase price. When an offer is accepted, the unsuccessful bidders will be so notified and the checks or money orders of all unsuccessful bidders shall be immediately returned to them. Checks or money orders may be held by the Housing Authority of the City of Seattle without deposit and at the bidder's risk until the successful bidders are selected.

EXHIBIT "B"

Housing and Home Finance Agency
Public Housing Administration

General Conditions

1. The property available for sale is described in the Invitation to Bid annexed hereto and made a part hereof.

2. Performance Security. The Purchaser shall within five days of the delivery to the Purchaser of

an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier's check or money order payable to the Seattle Housing Authority in the amount required under Section 3 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages determined by the Contracting Officer to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security.

3. Scope. (a) The Purchaser shall furnish all labor and material, perform all work, and assume all expenses necessary to accomplish the following:

(1) Remove buildings with wood floors down to ground level, including wood, brick or concrete block foundation posts or piers; remove all concrete, including slabs and entrance walks;

(2) Take down, preserve, and replace as directed, telephone, telegraph or other wires or fences and their appurtenant poles or posts or other interferences which may obstruct the removal of the buildings; excepting those serving buildings not included in this contract;

(3) Have all services, such as water, gas, steam, electricity and telephones, disconnected at the service mains in accordance with the rules and regulations of the owners of the utility involved or the local municipality. Securely cap and seal all storm and sanitary sewers leading from structures to be removed and backfill only after inspection by the Contracting Officer. Cap water service line at foot of riser to dwelling. Preserve all active utilities traversing the project site;

(4) Remove all salvage (except as specified herein) and debris resulting from the operation and all tools and apparatus from the site, restore the site of the buildings, as far as possible, to its condition immediately prior to the removal of the buildings by filling solidly any holes or trenches resulting from the operation and leave the site clean and free from hazards, all to the satisfaction and approval of the Contracting Officer.

(b) In the performance of the foregoing work the Purchaser shall at all times provide adequate protection to persons and property, and to prevent spread of dust and flying particles; provide water and necessary connections therefor; and shall avoid interfering with the use of the adjacent buildings or interruption of free passage to or from the same.

(c) The Purchaser shall use no dynamite nor powder and do no blasting on the site and shall not

burn materials or debris on the site without the specific permission of the Contracting Officer.

4. Licenses and Permits. The Purchaser shall obtain and pay for all required permits, licenses and fees necessary in connection with its work, without cost or expense to the Government.

5. Liability for Protection. The Purchaser shall assume responsibility and be liable from and after the date of delivery to the Purchaser of an executed copy of this contract, for the care and protection of the property conveyed by this instrument.

6. Time and Commencement and Completion of Work. The Purchaser shall not commence work until he has made payment in full of the purchase price and until delivery to the Housing Authority of the Performance Security required under Paragraph 2 hereof and shall complete the removal of the buildings or structures and all clean-up operations within a reasonable period not to exceed the period of time specified in Paragraph 3 of the Invitation to Bid. In the event the Purchaser fails to complete the removal and clean-up operations within such period of time, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwellings and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed.

7. **Officials Not to Benefit.** No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit

8. **Assignment.** Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15.)

9. **Covenant Against Contingent Fees.** Purchaser warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to require the Purchaser to pay, in addition to the contract price or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

10. **Non-Discrimination.** There shall be no discrimination by reason of race, creed, color, national origin or political affiliations, against any employee or applicant for employment qualified by training and experience, for work in connection with this contract.

11. Definitions. The term "Contracting Officer" shall mean the person signing this contract for the Government or his duly authorized successor in office and any person authorized to act for him as his duly authorized representative.

12. Notice of acceptance of offer shall be made by depositing in the United States mails a notice addressed to the Purchaser at the address designated in the offer.

13. This offer shall remain in effect for 60 days from the date of the opening of bids and thereafter until accepted or rejected by the seller, or withdrawn in writing by the bidder.

14. If a government agency has requested in its offer time beyond the end of said period to acquire funds to purchase or to obtain transfer of funds and the Public Housing Administration has determined that additional time shall be allowed, the date of settlement shall be so extended.

15. All work performed in connection with this contract shall be paid for at not less than the prevailing wage scale paid in Seattle, Washington.

EXHIBIT "C"

Housing and Home Finance Agency
Public Housing Administration

Offer and Acceptance of Offer

(Sale and Removal of Buildings and Site Clearance)

Contract No.: (Wash. 45302-SF) d-1,

Disposal Unit No.:

Total Sales Price: \$23,364.00.

Project No.: Wash. 45302,

Location: Seattle, Washington,

Date: June 22, 1953.

To: Public Housing Administration,
c/o Housing Authority of the City of Seattle,
Seattle, Washington.

1. The undersigned, hereinafter referred to as the "Purchaser" has been furnished by the United States of America, acting through the Public Housing Administration, a constituent of the Housing and Home Finance Agency, hereinafter referred to as the "Seller," with a copy of the General Conditions and the Invitation to Bid, setting forth the conditions under which the property will be sold.

2. The Purchaser offers and agrees to purchase from the Seller and to remove the property set forth and described in Attachment A, attached to

the Invitation to Bid and General Conditions, and to clean the building site or sites, such offer being governed by and subject to the General Conditions covering the sale of such property, at the purchase price as listed by the Purchaser on Attachment A.

3. The Purchaser transmits herewith a certified or cashier's check or money order in the amount of Seven hundred sixty-seven and 28/100 Dollars (\$767.28) payable to the Seattle Housing Authority to be held and applied as set forth in the Invitation to Bid.

4. This offer shall be binding upon the Purchaser, his (its) successors and assigns in the manner and for the period, and may be accepted by the Seller, all as set forth in the General Conditions and the Invitation to Bid.

5. The Government reserves the right as its interest may require, to reject all bids and to waive informalities in bidding. Awards to bidders making alternate choices may be made in the Government's interest.

By A. E. SHERMAN for
CENTURY INVESTMENT
CORP.,

/s/ A. E. SHERMAN,
Purchaser, 1101 Stewart St.,
Seattle, Wash.

Witness:

.....,

R. F. EDMONDSON,

5633 42nd S. W.,

Seattle, Wash.

Accepted by the Government as to the following
disposal units subject to the General Conditions:

Disposal Unit No.: 101 thru 110, inclusive.

Building No.:

Address:

Price Bid: \$23,364.00.

PUBLIC HOUSING ADMINIS-
TRATION,

By /s/ E. STANTON FOSTER,

Deputy Director, San Fran-
cisco Field Office.

/s/ MARIE GRAHAM,

Attesting Officer.

Date: July 14, 1953.

EXHIBIT "C"

Attachment A

Duwamish Bend Apartments, Wash-45302

(All buildings are 1-story)

Sales Unit Number	Street Address	No. of Dwelling Buildings	No. of Dwelling Units	Price Bid
101	6511-5th Ave. South	2	12	\$ 2,112.00
102	6500 Maynard Avenue	2	12	1,932.00
103	6528-6th Ave South	2	12	1,932.00
104	6542-6th Ave. South	3	18	2,898.00
105	6361 Maynard Avenue	2	12	1,932.00
106	6702 Maynard Avenue	2	12	1,932.00
107	6701 Maynard Avenue	3	18	2,898.00
108	525 River Street	2	12	1,932.00
109	530 Potlatch Court	3	18	2,898.00
110	500 Potlatch Court	3	18	2,898.00
				<hr/>
				\$23,364.00
5 & 2% of bid.....				767.28

[Endorsed]: Filed October 4, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S COMPLAINT BY DEFENDANTS ARTHUR G. BARNETT AND VIRGINIA D. BARNETT, HIS WIFE, AND DONALD F. OWENS AND JANE DOE OWENS, HIS WIFE

Come now the defendants, Arthur G. Barnett and Virginia D. Barnett, his wife, and Donald F. Owens and Jean Owens, his wife, and move the Court for an order dismissing the complaint of the plaintiff as to these defendants on the ground and

for the reason that said complaint fails to state a claim upon which relief can be granted against these defendants.

Dated this 26th day of October, 1954.

ALEC DUFF, and
ARTHUR G. BARNETT,

By /s/ ALEC DUFF,
Attorneys for Said Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 26, 1954.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS
ESTER TO DISMISS

Come Now defendants Edward R. Ester and wife and move the court to dismiss plaintiff's complaint in the above-entitled action on the ground and for the reason that the same fails to state a claim upon which the relief prayed for therein can be granted as against these defendants.

ROBBINS & ROBBINS,
/s/ MORRIS A. ROBBINS,
Attorneys for Defendants
Ester.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 29, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS ESTER

Come Now the defendants Edward R. Ester and wife and answering plaintiff's Complaint herein, deny, admit and allege as follows:

I.

These defendants admit paragraph I of said Complaint.

II.

Answering paragraph II, these defendants were not parties to the contract therein referred to and have no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and, therefore, deny the same on information and belief.

III.

Answering paragraph III, these defendants have no knowledge or information concerning Exhibit C referred to in said paragraph, sufficient to form a belief regarding the provisions in said paragraph set forth and, therefore, deny said paragraph on information and belief.

IV.

Answering paragraph IV, these defendants were not parties to the contract referred to in said paragraph and have no knowledge or information as to any provisions therein relating to removal of temporary buildings and, therefore, deny the same on

information and belief. These defendants admit the remainder of said paragraph IV.

V.

Answering paragraph V, these defendants have never seen the bond referred to in said paragraph and have no knowledge or information concerning its contents and provisions and, therefore, deny the same on information and belief.

VI.

Answering paragraph VI, these defendants admit that they purchased Building #105 and are renting the same but deny that the same was purchased from the Century Investment Corporation, and deny the remainder of said paragraph, and especially deny that they are acting in violation of any contract or any law.

VII.

These defendants deny paragraph VII.

VIII.

Answering paragraph VIII, these defendants deny the same and each and every allegation, matter or thing therein contained insofar as said paragraph applies to these defendants.

IX.

These defendants deny paragraph IX of said Complaint.

First Defense

That no privity of contract exists between these defendants and the plaintiff and that these defend-

ants are under no contractual obligation to remove the housing purchased by them as hereinafter more particularly alleged.

Second Defense

These defendants are not under any legal obligation by virtue of any statute, ruling or otherwise, to remove the housing purchased by them.

Third Defense

That as hereinafter more particularly alleged, Building #105, owned by them, is not temporary in nature and not within the purview of the Lanham Act or subject to any of its provisions.

Fourth Defense

That the removal of Building #105, owned by these defendants, is not in the public interest.

Fifth Defense

That to compel these defendants to remove Building #105 would be inequitable, unjust, oppressive and would deprive these defendants of their property and property rights without due process of law and in violation of their constitutional rights.

Sixth Defense

That these defendants have in good faith expended large sums of money in improving said Building #105 and in converting the same from temporary into permanent housing, and for the

purchase of the land on which said housing is situated, and that the removal of said housing would cause these defendants grave financial loss and that such removal is of no benefit or advantage to the plaintiff and that the plaintiff would suffer no damage whatever if said building is not removed from its present site.

First Affirmative Defense

By way of first affirmative defense these defendants allege: That on or about June, 1953, the Public Housing Administrator acting in behalf of plaintiff, sold and conveyed the houses described in plaintiff's Complaint to the Century Investment Corporation and vested said purchaser with full power and authority to resell said housing, or any portion thereof, to third party purchasers and to vest such purchaser with full legal title to said housing. That thereafter said Century Investment Corporation sold Building #105 to one Carl W. Pague. That in November, 1953, the said Carl W. Pague sold and delivered Building #105 to these defendants for a valuable consideration. That before purchasing the said building these defendants inquired as to their right to keep said building on site and rent the same. That one, Virgil J. Pague, who these defendants believe was the president of Century Investment Corporation, stated and represented to these defendants that it was lawful and proper to keep and use said Building #105 on site provided that said building was remodelled and renovated in com-

pliance with the Building Code requirements of the City of Seattle. Said Pague further stated and represented that the purchaser, the Century Investment Corporation, had been renting other buildings which were part of said housing project on site for a number of months with the full knowledge, permission and acquiescence of the Public Housing Administrator. That said Pague suggested to these defendants that they contact the Housing Authority of the City of Seattle, which was in charge of said housing project, for verification of his statements and representations. That acting upon said suggestion, these defendants contacted the Housing Authority of the City of Seattle and were assured by one Michaelson, the apparent head of the Housing Authority of the City of Seattle, which had charge and control of said housing project, that these defendants could lawfully rent Building #105 on site and that it would not be necessary to remove the same, providing that these defendants complied with the Building Code of the City of Seattle.

That relying upon the statements and representations aforesaid, and upon the fact that the Century Investment Corporation had been renting houses on site without interference or action by plaintiff and with the plaintiff's apparent permission and consent, for a number of months, and upon the assurance of the authorized and constituted agency, in charge of said housing project that it would not be necessary to remove said building provided it

was renovated and remodelled in accordance with the requirements of the Building Department of the City of Seattle, these defendants did, for value, and in good faith, and without any knowledge to the contrary, purchase the said Building #105 from said Carl W. Pague and did purchase and acquire the land upon which said building was situated. That in further reliance thereon, these defendants did remodel, renovate and improve said Building #105 under proper permits from the Building Department of the City of Seattle. That they removed the old plumbing and replaced the same with entirely new plumbing. That they renovated the heating plant, installed new oil burners and storage tanks; placed siding on the exterior, installed coverings for porches, reinforced the foundation, renovated and rebuilt the kitchens, installed new gas ranges and new refrigerators and did other work required by the Seattle Building Department in order to convert said temporary housing into permanent housing complying with the Building Code of said City. That these defendants expended in excess of \$16,000.00 in the acquisition of said building, land and improvements. That all of said expenditures were made in good faith and in the honest belief that their actions were lawful and in reliance upon the aforementioned statements and representations, and upon the apparent authority conferred by plaintiff upon the Century Investment Corporation. That these defendants were led to believe by the fact that their vendors were renting other buildings on site without mole-

station or interference by the plaintiff that it was lawful so to do, and that plaintiff did not deem it in the public interest to remove such buildings and had waived its requirement for their removal. That by reason of the aforesaid acts and conduct of the plaintiff and its agents and representatives, plaintiff has either waived, or is now estopped from asserting, any right or claim for the removal of Building #105 owned by these defendants.

Second Affirmative Defense

By way of second affirmative defense these defendants allege: That the Judgment in the condemnation proceeding granted plaintiff the right to lease the lands described in plaintiff's Complaint, including the land now owned by these defendants, on a year to year basis commencing February 21st. That in order to renew said lease from year to year, plaintiff was required to obtain the consent of the landowners and to pay or tender rental specified in the Judgment in said condemnation proceeding before the commencement of the next rental year. That plaintiff failed to obtain the consent of these defendants to renew its lease on the land on which Building #105 is situated. or to pay or tender the rental therefor, prior to February 21, 1954. That by reason of such failure, the plaintiff has either abandoned said lease or waived or lost its right to renew the same. That since February 21, 1954, plaintiff has not had and does not now have any right to the use of the land owned by these defendants or

which Building #105 is situated, and no right or title whatever in said land or said building, and is now without legal right to enter upon said land for any purpose whatsoever without order of this Court or consent of these defendants.

Cross-Claim

By way of cross-claim against plaintiff, these defendants allege:

I.

These defendants reallege their First Affirmative Defense and Second Affirmative Defense hereof and by reference incorporate the same herein and make the same a part of this cross-claim as though fully set forth herein.

II.

That these defendants are the owners and entitled to possession of Building #105, located at 6361 Maynard Avenue, Seattle, Washington, and Lots 21, 22, 23 and parts of Lot 19, and have a legal right of possession to Lots 19 and 20, all in Block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington. That plaintiff does not have and is not entitled to assert any right, title or interest in said building or said real property, and is not entitled to the possession or use of either. That these defendants are entitled to a judgment and decree of this Court adjudging them to be the absolute owners and entitled to exclusive possession and use of said building and lands and quieting their title and right of exclusive possession

and use of same and removing the alleged claim of plaintiff herein as a cloud upon these defendants' said title and exclusive use and possession of said building and lands.

Wherefore, these answering defendants pray for judgment and decree of this Court as follows:

1. Dismissing plaintiff's Complaint herein with prejudice and adjudging that plaintiff take nothing by virtue of same.

2. Confirming their title and exclusive right of possession and use of said Building #105 and the lands on which the same is situated as hereinabove described, and removing the plaintiff's claim as a cloud upon these defendants' said title.

3. Costs and disbursements herein incurred.

4. For such other and further relief as the Court may deem just and equitable in the premises.

/s/ MORRIS A. ROBBINS,
Attorney for Defendants
Ester.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS PAGUE

Defendants Virgil J. Pague and Carl W. Pague and Jane Doe Pague, his wife, answer the Complaint herein as follows:

I.

Answering Paragraph II, these defendants deny that Virgil J. Pague entered into any contract in writing with the Director of the Public Housing Administration, as therein alleged, or that he assumed any obligation to carry out the terms of said alleged contract.

II.

Answering Paragraph VI, these defendants admit that Virgil J. Pague has acquired from Century Investment Corporation certain of the buildings mentioned in said Complaint and is now the legal owner thereof, and to the best of the knowledge and belief of these defendants, Arthur G. Barnett, Donald F. Owens and Edward R. Ester are the owners of other such buildings. These defendants deny that the buildings are temporary and admit that Virgil J. Pague has rented certain apartments therein, but deny that they have violated in any way any contract to which they are parties. Except as specifically admitted herein, these defendants deny each and every allegation of Paragraph VI.

III.

These defendants deny each and every allegation in Paragraph VIII and IX of the Complaint.

For a Further and First Affirmative Defense, These Defendants Allege:

I.

Defendant Virgil J. Pague is the owner of and entitled to the possession of the land upon which Building 102 stands, and said defendant is the lessee and the person entitled to the possession of the land upon which Building 103 stands. Said buildings have been modified so that they are not temporary buildings, and meet all requirements of the Building Codes of the City of Seattle and the zoning ordinances thereof, and are in every respect suitable buildings to be upon the land where they now stand. Said buildings are vitally needed for public housing and approval has been obtained of the City of Seattle for them to be located in the future upon the land where they now stand.

II.

Any interest of the plaintiff in the land where said buildings now stand either has terminated or will terminate shortly, and the owners of said land will not hold plaintiff to any obligation to remove said buildings therefrom and plaintiff will suffer no damage if said buildings remain upon the sites where they are now located.

III.

Upon the expiration of plaintiff's lease upon the sites where the buildings now stand, which will occur shortly if it has not already occurred, defendants will have a legal right to maintain said buildings thereon and to replace the same there if they

be now moved therefrom, and no good or equitable purpose can be served by requiring the removal of said buildings at this time.

For a Further and Second Affirmative Defense,
These Defendants Allege:

I.

The tenure of plaintiff to the land upon which the buildings referred to in the complaint stand has expired and plaintiff now wrongfully asserts the right to possession of said land and said assertion constitutes a cloud upon the title of these and other defendants herein who are the rightful owners and/or persons entitled to possession of both said land and said houses.

Wherefore, these defendants pray that the prayer of the complaint be denied and that the court quiet the title in these defendants to buildings 102 and 103 and the lands upon which they stand against any claims of plaintiff to any tenure or right to possession thereof, and that these defendants have such other and further relief as to the court shall seem equitable.

LYCETTE, DIAMOND &
SYLVESTER,

By /s/ LYLE L. IVERSEN,
Attorneys for Defendants
Pauge.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ANSWER OF CENTURY INVESTMENT
CORPORATION

Century Investment Corporation answers the Complaint herein as follows:

I.

Answering Paragraph II, this defendant admits that it entered into a contract on or about July 14, 1953, with the Director of Public Housing for the purchase of certain housing units as set out in Exhibit "C" attached to the complaint. Except as specifically admitted herein, this defendant denies every allegation in Paragraph II of the complaint.

II.

Answering Paragraph IV of the complaint, this defendant admits that the date of November 2, 1953, was originally set for completion of the removal of the buildings, but alleges that said date was extended and this defendant was led to believe by authorized agents of the government that certain buildings which might be made to conform to the requirements of the Building Code of the City of Seattle might be allowed to remain in place as permanent type buildings; and in reliance thereon this defendant sold buildings 102, 103, 104 and 105 to other parties without removing the same from the locations upon which they stood, and said buildings have been so modified as to meet all the requirements of the City of Seattle and said structures are

no longer temporary buildings. This defendant admits that said buildings now stand upon the lots alleged in Paragraph IV. Except as admitted herein, the allegations of Paragraph IV are denied.

III.

Answering Paragraph VI of the complaint, this defendant admits that Virgil J. Pague purchased from it buildings 102 and 103, and denies every other allegation of Paragraph VI.

IV.

This defendant denies each and every allegation of Paragraphs VIII and IX of the complaint.

For a Further and Affirmative Defense, This Defendant Alleges:

I.

Each of the buildings now standing upon its original site has been so modified that the same is not a temporary building, and each of said buildings meets all requirements of the Building Code of the City of Seattle and the zoning ordinances thereof, and is in every respect suitable to be upon the land where it now stands. Said buildings are vitally needed for public housing and approval has been obtained from the City of Seattle for them to be located in the future upon the land where they now stand.

II.

Any interest of plaintiff in the land where said buildings now stand either has terminated or will

terminate shortly, and the owners of said land will not hold plaintiff to any obligation to remove said buildings therefrom and plaintiff will suffer no damage if said buildings remain upon the sites where they are now located.

III.

Upon the expiration of plaintiff's lease upon the sites where the buildings now stand, which will occur shortly if it has not already occurred, the owners of said buildings will have a legal right to maintain said buildings thereon and to replace the same there if they be now removed therefrom, and no good or equitable purpose can be served by requiring the removal of said buildings at this time. The owner of each of said houses is also the owner or lessee and the person entitled to possession of the land upon which the same now stands.

Wherefore, this defendant prays that the complaint be dismissed as to it.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Defendant Cen-
tury Investment Company,

By /s/ LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ANSWER, DEFENSES AND AFFIRMATIVE
DEFENSES BY DEFENDANTS DONALD
F. OWENS AND JEAN OWENS, His Wife,
AND ARTHUR G. BARNETT AND VIR-
GINIA D. BARNETT, HIS WIFE

Come now the above-named defendants, Donald F. Owens and Jean Owens, his wife and Arthur G. Barnett and Virginia D. Barnett, his wife, and by way of answer to the complaint of the plaintiff allege as follows:

I.

Answering paragraph II of plaintiff's complaint, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Answering paragraph III of said complaint, these defendants allege that the exhibits referred to therein and from which quotations are taken, speak for themselves.

III.

Answering paragraph IV of said complaint, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth thereof; that these defendants admit the allegations in said paragraph as set forth on page 3 of plaintiff's complaint beginning line 10 and line 11 as to a portion of Building 104, as to the location thereof.

IV.

Answering paragraph V of plaintiff's complaint, admit the same.

V.

Answering paragraph VI of plaintiff's complaint as it pertains to these defendants admit that these defendants purchased Building 104, and admit that these defendants have rented apartments in said Building 104, and deny all the other remaining allegations in said paragraph VI, and specifically deny that they purchased from Century Investment Corporation, and deny that Building 104 is temporary.

VI.

Answering paragraph VII of plaintiff's complaint, these defendants deny the same excepting that as to these defendants the said A. E. Sherman asserts an adverse claim in the form of a lien filed by the said A. E. Sherman against Building 104.

VII.

Answering paragraph VIII of plaintiff's complaint, these defendants deny the same.

VIII.

Answering paragraph IX of plaintiff's complaint, these defendants deny the same insofar as these defendants are referred to therein.

First Defense

The complaint fails to state a claim against the defendants, Donald F. Owens and Jean Owens, his

wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, upon which relief may be granted.

Second Defense

That the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, are not parties to the contract for the violation of which damages are sought by the plaintiff.

Third Defense

That the laws of the United States relate to temporary housing whereas Building 104, now owned by the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, and which was formerly temporary and subject to condemnation under the laws of the City of Seattle, has been changed and is now permanent housing in compliance with the codes of the City of Seattle governing the occupancy of dwellings by human beings; that whereas removal of temporary housing is declared in the laws of the United States to be in the public interest, the removal of permanent housing is not in the public interest.

Fourth Defense

That plaintiff has abandoned its use of the land upon which Building 104 is situate, legally described as follows:

The South $1\frac{1}{2}$ of Lot 12 and Lots 13, 14, 15, 16, 17, 18, 19 and 20, Block 11, Joseph R. Mc-

Laughlin's Water Front Addition to the City of Seattle, according to plat thereof, Recorded in Volume 13 of Plats, page 28, records of King County, King County, Washington.

that these defendants are the owners of said land, having paid \$17,484.91 for the purchase thereof, a portion of the same being bought under a contract for the sale of real estate on which there is an approximate balance now due of \$4,300.00; that the said land was condemned along with other parcels for emergency housing and said emergency has long ceased to exist, and plaintiff has already released other portions of said lands and is, without good reason in law or in equity, attempting to renew its lease of the lands now owned by these defendants; that the sole reason for the plaintiff's renewals or attempted renewals under the facts as set forth in the affirmative defenses of the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, which by this reference are incorporated herein as though fully set forth, is to clear the land owned by these defendants of "temporary" housing and return it to these defendants in such a condition so that the plaintiff will not be subject to an action for damages by these defendants; that plaintiff has attempted to renew said leases from time to time in a manner not authorized by law.

Fifth Defense

That plaintiff is attempting to deprive these defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, of their property without due process of law.

First Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, allege that during the latter part of November, 1953, they were advised that buildings 102 and 103, also involved in this suit, were occupied by tenants and that the City of Seattle had allowed occupancy of these buildings by human beings after compliance with Seattle building codes, and that the plaintiff has advised that if title to the lands and the units situate thereon became merged and the buildings made to comply with the building codes of the City of Seattle, that the same would constitute a removal under the laws of the United States; that with reference to Building 104, the defendant, Arthur G. Barnett, was advised by plaintiff's agents that if the land and Building 104 located thereon were owned by one party and changes made to comply with the building codes of the City of Seattle, the same would constitute "a removal" under the laws of the United States, but that adequate proof thereof should be forwarded to the plaintiff; that relying on plaintiff's conduct and advice the defendants, Donald

F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, consummated purchase of a portion of Building 104 from R. M. Scougal and F. T. Crow for the sum of \$1,715.09 and the remaining portion of Building 104 from Virgil J. Pague for the sum of \$4,696.00. The original cost of said Building 104 as shown in plaintiff's Exhibit C-2 is the sum of \$2,898.00. These defendants participated in no portion of the profit made from said sale by the defendants, Century Investment Corporation or any of its vendees.

Relying on the two Warranty Bills of Sale obtained from vendors, and having already purchased the land, as set forth hereinabove in paragraph Fourth Defense, these defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, expended approximately \$17,337.14 in addition to the purchase price of the buildings, to comply with the building codes of the City of Seattle, excepting for approximately \$3,100.00 for the purchase and installation of gas stoves, meters and new Westinghouse refrigerators; that additional work is needed on the heating plant and at the time of the trial of this action the final cost thereof will be submitted in evidence; that according to estimates given to these defendants, it will cost approximately \$4,600.00 to cut up and move Building 104 and to return said building back to the land owned by these defendants; that it would be a useless act to thus compel the defendants, Donald F. Owens and Jean Owens,

his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, to move said units only long enough to allow the plaintiff to return the land to these defendants, thus enabling these defendants to move said building back onto their land; furthermore, it would be a useless expense, not favored in equity, to pay the costs of moving said Building 104 back and forth, together with the costs of disconnecting and reconnecting the gas mains, hundreds of feet of which were installed by the Seattle Gas Company to reach the building belonging to these defendants and the defendants Ester, and to disconnect and reconnect electric wiring, plumbing, sewers, etc.; that these acts would not be in the public interest; that the damage and losses to the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, would be enormous, while the alleged damage to the plaintiff would be minor, if at all.

That the yearly rental which the plaintiff alleges as damages for the year beginning February 21, 1954, because plaintiff has been forced to renew its use of the lands amounts to the sum of \$159.00 per year for lands owned by the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, of which sum \$117.00 is still in the possession of the plaintiff and has not been paid to or tendered to these defendants; that these defendants waive any right to said rent and will stipulate to return to

plaintiff the amount of rent paid and will waive said \$117.00 and will stipulate to the return of the land and acceptance of the same in its present condition and to hold plaintiff harmless; that plaintiff has released other lands involved herein upon waiver of rent and reimbursement of rent and acceptance of the land in its condition and without liability running against the plaintiff.

Second Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, allege all of the matters set forth in the First Affirmative Defense and by reason of the matters set forth therein allege that the plaintiff is estopped to deny its opinions, advice and actions therein stated and relied upon by these defendants.

Third Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, based on the facts related in the First Affirmative Defense, which is realleged herein, allege that the plaintiff, by its laches and course of conduct, entrapped these defendants, and plaintiff is thereby foreclosed in law and in equity from the relief which it seeks; further in this respect, these defendants allege that it is common knowledge, of which the Court will take judicial notice, that similar units to those contained

in Building 104 have been sold and placed on other locations in the City of Seattle and changed to comply with the building codes of the City of Seattle, and that there was therefore good reason in fact or in law or in equity for these defendants to believe and rely upon the opinions, advice and conduct of the plaintiff that the changes made would constitute a technical removal.

Fourth Affirmative Defense

These defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, reallege their First Affirmative Defense and based on the facts therein stated allege that plaintiff has waived any rights it may have possessed against the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife. The plaintiff has further waived any rights it may have possessed for the reason that plaintiff, knowing of the plans and of the work done and of the purchases of Building 104 and the land thereunder by these defendants, and the fact that these defendants were relying on the representations of plaintiff's agents and were acting in reliance thereon, permitted these defendants to continue their course of conduct in making the purchases and changes referred to herein.

Wherefore, the defendants, Donald F. Owens and Jean Owens, his wife; and Arthur G. Barnett and Virginia D. Barnett, his wife, pray that the prayer

of the plaintiff be denied as to these defendants, excepting plaintiff's prayer for such other and further relief as to the Court may seem just and equitable, and that the Court assess any damages found to be due the plaintiff against the parties privy to the contract with the plaintiff.

ALEC DUFF, and

ARTHUR G. BARNETT,

Attorneys for the Defendants, Donald F. Owens and Jean Owens, His Wife; and Arthur G. Barnett and Virginia D. Barnett, His Wife.

By /s/ ALEC DUFF.

Receipt of copy acknowledged.

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

ORDER DISCHARGING RULE TO SHOW
CAUSE AND DENYING MOTIONS TO
DISMISS

An order to show cause having heretofore been issued by this Court citing the defendants to appear on the 5th day of November, 1954, at 2:00 o'clock p.m. and show cause why they should not be required to remove certain buildings described in the complaint, and to do certain other things mentioned in said order to show cause, and the defendants having made return to said order to show cause

and the defendants having separately moved to dismiss the complaint and said order to show cause having regularly come on for hearing at the time stated, and said motions to dismiss having been noted for said time, and all the parties, plaintiff and defendant, having been represented by counsel, and the Court having heard the arguments and having considered the affidavits in support and in opposition to the rule to show cause, and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed:

1. That plaintiff take nothing under the order to show cause and that the rule be discharged.

2. That the motions to dismiss, made separately by the defendants, be and they are hereby each denied.

3. Defendants shall have until Friday, November 12, 1954, to answer the complaint.

Done in Open Court this 16th day of November, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Defendants
Pague;

By /s/ LYLE L. IVERSEN.

Approved as to form and Notice of Presentation
waived:

/s/ ALEC DUFF,
Attorney for Arthur G. Barnett et ux., and Donald
P. Owens, et ux., Defendants.

/s/ MALCOLM McLEOD,
Attorney for Hartford Accident & Indemnity Co.
and A. E. Sherman.

/s/ GERALD SHUCKLIN,
Attorney for Defendant
Geneva L. Pague.

Approved for entry and Notice of Presentation
waived:

/s/ MORRIS A. ROBBINS,
Attorney for Defendants
Ester.

Approved as to form:

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ JOHN A. ROBERTS, JR.,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed November 16, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant, Century Investment Corporation, requests plaintiff, within ten days after service of this request, to make the following admissions for the purpose of this action only, pursuant to Rule 36 of the Rules of Civil Procedure:

1. That the document attached hereto, headed "Resolution No. 16729" is a true copy of a resolution passed by the Council of the City of Seattle on the 13th day of September, 1954, and that the same is on file with the Comptroller and Clerk of the City of Seattle and has not been rescinded or modified by the Council of the City of Seattle, and further, that a certified copy of said resolution was transmitted by the City Clerk of the City of Seattle to the San Francisco Field Office of the Federal Public Housing Administration.

2. That the document attached hereto, headed "Re: Cancellation of permit for use and occupancy of street area" is a true copy of a letter transmitted by the Board of Public Works of the City of Seattle to the Federal Agency shown thereon, and that the same was duly received on a date shortly after that, which the document bears.

3. That the action of the Board of Public Works of the City of Seattle as related in the attached letter, headed "Cancellation of permit for use and occupancy of street area" is correctly stated in

said document, and that said action did take place.

4. That Virgil J. Pague is the owner of the land upon which building 102 stands.

5. That defendant Virgil J. Pague owns or has under lease from the owner thereof, the land upon which Building 103 stands.

6. That on or about the 5th day of January, 1955, defendant Virgil J. Pague served upon the United States District Attorney and filed in Cause No. 1143, a document in accordance with the copy thereof attached hereto, headed "Notice of Refusal to Renew."

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Defendant, Century Investment Corporation,

By /s/ LYLE L. IVERSEN.

Resolution No. 16729

A Resolution approving the long term use on the site of certain renovated temporary family dwelling units in Block 11, J. R. McLaughlin's Waterfront Addition for rental purposes; and making a recommendation to the Public Housing Authority in connection therewith.

Whereas, the petitioners mentioned in Comptroller's File No. 225125 state that they have purchased and have renovated certain temporary family

dwelling units which the Public Housing Administration has sold for removal from the site; and

Whereas, said petitioners have requested the City Council to recommend the on-site sale to them of said units by the Public Housing Administration for long term use by the petitioners for rental purposes; and

Whereas, the City Council deems such use to be consistent with the public interest in this instance;

Now, therefore,

Be It Resolved by the City Council of the City of Seattle:

That certain temporary family dwelling units in Block 11, J. R. McLaughlin's Waterfront Addition which have been purchased and renovated by the petitioners mentioned in Comptroller's File No. 225125, are hereby approved for use on the site for rental purposes, for a period of five years from October 1, 1953; and the City Clerk is hereby authorized and directed to so advise the Public Housing Administration, San Francisco Field Office, 1360 Mission Street, San Francisco 3, California, by transmitting a certified copy of this resolution to said agency with the recommendation, which is hereby incorporated in this resolution, that said agency waive its requirement for the removal of such units from the site and permit the on-site sale thereof for such use to the petitioners, to wit: Arthur G. Barnett and Associates, 1304 Northern Life Tower, Seattle 1, Washington.

Passed the City Council the 13th day of September, 1954, and signed by me in open session in authentication of its passage this 13th day of September, 1954.

/s/ M. B. MITCHELL,

President of the City Council.

Filed by me this 13th day of September, 1954.

Attest:

/s/ N. C. THOMAS,

City Comptroller and City
Clerk,

By /s/ W. A. PENNE,

Deputy.

State of Washington,
County of King,
City of Seattle—ss.

I, W. C. Thomas, Comptroller and City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of Resolution No. 16729 of the City Council of the City of Seattle, being

A Resolution approving the long-term use of the site of certain renovated temporary family dwelling units in Block 11, J. R. McLaughlin's Waterfront Addition, for rental purposes; and making a recommendation to the Public Housing Administration in connection therewith as the same appears on file, and of record in this Department.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the City of Seattle, this 14th day of September, 1954.

[Seal] W. C. THOMAS,
 Comptroller and City Clerk,

By /s/ C. G. ERLANDSON.

October 28, 1953.

Registered

Re: Cancellation of permit for use and occupancy
of street area.

Federal Public Housing Authority,
Mr. John Melville,
Director of the San Francisco Field Office,
1360 Mission Street,
San Francisco, California.

Dear Sir:

It has been brought to the attention of the Board of Public Works that the housing project in the vicinity of 6th South and Michigan Street is being dismantled and the property being cleared of all structures. The Board of Public Works, City of Seattle permit, A 5575, covers the use and occupancy of certain streets and alleys in this area upon which buildings in this project were located.

The Board of Public Works in regular session today, in view of this development, took action to

cancel permit A 5575 and in accordance therewith you are herewith notified that all buildings and appurtenances occupying the streets and alleys covered in the above permit must be removed and the property restored to its original condition within 30 days from the date of this notice.

By order of the Board of Public Works in regular session October 28, 1953.

Respectfully yours,

BOARD OF PUBLIC WORKS,

E. G. HENRY,

Executive Secretary.

sb

cc: Mr. Matson

[Title of District Court and Cause.]

NOTICE OF REFUSAL TO RENEW

To the above-named Petitioner, and to Charles P. Moriarty and Richard D. Harris, its Attorneys:

Virgil J. Pague hereby gives notice that he does not consent to the renewal of the lease of the above-named Petitioner as to Parcels 1 to 11 for the period beginning February 21, 1955, and further that he does not recognize that the Petitioner has any tenancy at this time in said property or any right to renewal.

Dated at Seattle, Washington, this 5th day of January, 1955.

LYCETTE, DIAMOND &
SYLVESTER,

By LYLE L. IVERSEN,
Attorneys for Virgil J. Pague.

Receipt of copy acknowledged.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

OBJECTIONS BY DEFENDANTS PAGUE
AND CENTURY INVESTMENT CORPO-
RATION TO GOVERNMENT'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Defendants Pague and Century Investment Corporation object to the draft of findings and conclusions proposed by the government on the following grounds:

1. The draft was not served upon counsel for these defendants in time to permit them five days for making objections and proposing alternate findings as provided in Rule 26 of the local rules of the United States District Court for the Western District of Washington.

2. Paragraph IV of the proposed findings is not supported by any evidence.

3. The findings are incomplete in that they fail to include the following important factual elements:

(a) The real estate underlying Buildings 102 and 103 is owned by defendant, Virgil J. Pague, and the real estate underlying Buildings 104 and 105 is owned by the other defendants herein, respectively.

(b) The right of the government to the use of the street areas underlying said buildings has been revoked and said permission is vested in defendants by the City of Seattle.

(c) Louis J. Michaelson acted as the contact for plaintiff in all dealings with purchasers of housing in the project designated, Wash-45302.

(d) Louis J. Michaelson led defendants to believe that approval would be forthcoming for leaving the buildings on site if brought up to city codes and acquiesced in and encouraged defendants to expend large sums of money in remodeling said buildings to bring them up to city codes.

(e) Louis J. Michaelson was vested with apparent authority to deal on behalf of plaintiff in all matters respecting the administration and interpretation of the contract of sale of the buildings in question.

(f) Buildings 102 and 103 were purchased by and are the property of Virgil J. Pague.

(g) Defendants have declined to recognize the right of the government to renew its lease and have

failed and refuse to accept any rental payment therefor.

(h) That at the conclusion of the trial of this cause upon motion of defendants' counsel, Jane Doe Pague, former wife of Virgil Pague, was dismissed as a defendant.

4. Paragraph XII of the proposed findings misstates the order of the court in that it undertakes to specify the emergency as that declared by the President of the United States whereas said order does not make any such statement.

5. The proposed findings are deficient in that they fail to include the fact that the government did not establish any monetary damages.

6. Paragraph IV of the Conclusions of Law is erroneous in reciting that in entering into the contract, the plaintiff's agency, the Public Housing Administration, was complying with the mandatory requirements of Section 313 of the Lanham Act.

7. The proposed findings in paragraph VIII of the Conclusions of Law are erroneous in that they state entirely wrong and illegal conclusions and undertake to change the contract from that entered into by the parties.

8. Conclusions of Law IX is improper in that it undertakes to require specific performance against persons who are not parties to a contract. It is further wrong in that it is based upon improper concepts of law.

9. Paragraph X of the Conclusions of Law is improper in concluding that the plaintiff had exclusive use of the real estate underlying the buildings involved in this action since said possession was lost both legally and physically by the plaintiff.

10. Paragraph XI of the proposed Conclusions of Law is improper in that it undertakes to find, contrary to the evidence, that the plaintiff has been damaged and calls for an accounting without any designation of the method of accounting and without any legal basis for an accounting.

11. Paragraph XII of the proposed Conclusions of Law is erroneous in that it denies relief to which the defendants are entitled under the law.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Defendants Century Investment Corporation and Defendants Pague.

By /s/ LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed October 12, 1955.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

* * *

IX.

From the time that the respective defendants acquired land upon which the buildings in question stood, they have declined to consent to any renewals

and have declined to accept any rent therefore and any amounts which have been paid by the Government into court on account of said rentals still remain in the hands of the clerk; that there is no proof that said payments to the clerk include the full amount of the specified rental including particularly payment of taxes.

* * *

Presented by:

ARTHUR G. BARNETT, and
ALEC DUFF,

Attorneys for Arthur G. Barnett and Donald F.
Owens, and

MORRIS ROBBINS,

Attorney for Edward R. Ester.

The foregoing forms of findings of fact and conclusions of law were by counsel presented to the undersigned trial judge with a request that the Court sign and enter them on October 20, 1955, which request was on said date respectfully denied.

/s/ JOHN C. BOWEN,
Judge.

Receipt of copy acknowledged.

Lodged October 19, 1955.

Rejected, endorsed and filed October 20, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial before the undersigned judge of the above-entitled court on the 7th day of September, 1955, on the Complaint of the plaintiff, as amended, and the answers thereto and cross-complaints of the respective defendants above named, and the plaintiff, United States of America, being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and John A. Roberts, Jr., Assistant United States Attorney for said district, and the said defendants and all of them, having each appeared by their respective counsel of record herein, and witnesses having been sworn, testimony taken, and evidence adduced, and the trial having continued from day to day until September 17, 1955, and the court having considered the evidence introduced by the parties hereto, the arguments and briefs of counsel, the pleadings and all other matters of record herein, and being fully advised in the premises, now makes the following:

Findings of Fact

I.

That prior to June 22, 1953, the Administrator of the Public Housing Administration, an agency of the Housing and Home Finance Agency of the United States of America, plaintiff herein, through his duly authorized representatives and through the

Housing Authority of the City of Seattle, an agency of the City of Seattle, Washington, issued a general invitation to the public to submit sealed bids for the sale and removal of ten temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate sites upon which said buildings were then located; said temporary dwelling buildings are designated by the Public Housing Administration and in said invitation to bid as buildings numbers 101 through 110 consecutively, of project Wash-45302 and are located in the City of Seattle, within the Northern Division of the Western District of Washington; that in issuing said invitation and in entering into the contract, hereinafter referred to, the Public Housing Administration was effectuating the requirements of Section 313 of the Lanham Act, hereinafter referred to.

II.

That by condemnation proceedings entitled *United States v. Certain parcels of land in King County, Washington, et al.*, Civil No. 1143 of this court, the United States of America acquired the exclusive use of the real estate, excluding street areas of the City of Seattle, underlying said buildings 101 through 110 of project Wash-45302, under authority granted by the Lanham Act, P. L. 849, 76th Congress, as amended; 54 Stat. 1125, 42 U.S.C. 1521 et seq., for the purpose of erecting temporary war housing thereon; that following the taking of said land, temporary war housing project Wash-45302 was erected thereon by the Public Housing Administration; that

the plaintiff has continuously held the exclusive use of certain parcels of said land, hereinafter specifically enumerated, and that the present term of such exclusive use extends to February 21, 1956; that the acts of the defendants complained of in this action are, and at all times material to this action have, interfered with the plaintiff's exclusive use of said land to the plaintiff's damage; that the Court during the trial of this cause took judicial notice of said Cause No. 1143 and all of the proceedings and files and records therein.

III.

That pursuant to said invitation, sealed bids were received, and opened by the Housing Authority, City of Seattle, on June 22, 1953; the bid of one A. E. Sherman, defendant herein, was the highest bid submitted; that said bids were forwarded to the Public Housing Administration and, thereafter that department of the plaintiff herein, advised the Housing Authority, City of Seattle that the bid of A. E. Sherman would be accepted and that the Housing Authority, City of Seattle was authorized to collect the difference between the amount of said bid and the bid deposit.

IV.

That A. E. Sherman submitted said bid under the direction, supervision and at the request of one Virgil J. Pague, defendant herein, his then employer; that the said Pague determined that said bid be submitted, the amount of said bid and supplied the money required for the bid deposit and

used the name and services of A. E. Sherman because Sherman was a man of small means while he, Pague, had substantial assets, so that in the event of any subsequent trouble concerning said buildings, the financial assets of the said Virgil J. Pague would be protected; that defendant Virgil Pague was not an original party to the contract with defendant Century but did, with Sherman's assistance, negotiate the contract.

V.

That on July 3, 1953, pursuant to notice, the balance of the purchase price due on said sale was tendered to the Housing Authority, City of Seattle at its office at 825 Yesler Street, Seattle, Washington, and in particular, to one Louis Michaelson, an employee of said organization who was the principal individual with whom the public dealt concerning the sale and removal of buildings and site clearance at project Wash-45302; that said payment was tendered by A. E. Sherman who, at said time and place advised the said Michaelson that said payment was tendered in behalf of the defendant, Century Investment Corporation, a proposed corporation and then in the preliminary stages of incorporation, and to which A. E. Sherman assigned his interest in said bid, and that the incorporators of same were Virgil J. Pague, defendant herein, and the same individual referred to in paragraph IV hereof, Albert A. Rontai and Orville Cohen; that at said time and place the contract with the plaintiff herein, was prepared in the name of Century Investment Corporation and thereafter forwarded with the balance of the pur-

chase price to the Public Housing Administration for approval and execution.

VI.

That on July 14, 1953, said contract for sale and off-site removal of temporary war housing buildings and site clearance at project Wash-45302 (attached hereto as Exhibit A and made part hereof), was executed by the Contracting Officer for the Public Housing Administration, and thereafter delivered to the Century Investment Corporation; that the details of completing incorporation were not accomplished and the articles of incorporation of the Century Investment Corporation were not filed with the Secretary of the State of Washington until July 17, 1953, but thereafter and prior to August 21, 1953, said corporation actively entered upon the work of completing said contract by retaining the said A. E. Sherman as its sales agent, selling and removing buildings and clearing the sites from which buildings were being removed.

VII.

That on July 14, 1953, a contract performance bond in the sum of \$5,000.00 was executed by the Century Investment Corporation through Virgil J. Pague, its president, as principal, and the Hartford Accident and Indemnity Company, as surety, in favor of the Housing Authority, City of Seattle, to insure the contract obligation of Century Investment Corporation that it would do all the work and furnish all the materials for the removal of buildings and site clearance and faithfully perform all

the conditions of said contract relating to project Wash-45302; that said contract of bond has never been assigned to or transferred by the Housing Authority, City of Seattle to the plaintiff herein.

VIII.

That concerning the sale of project Wash-45302, the Housing Authority of the City of Seattle and Louis Michaelson, its employee, were granted the limited authority by the Public Housing Administration to attend to the administrative details of same in publishing notices of invitation to bid, and in distributing contract literature as supplied to them by the Public Housing Administration and in accepting and opening sealed bids, and in notifying the successful bidder when authorized to do so by the Public Housing Administration, and in attending to the details of the contract execution by the purchaser; that each and all of the defendants who dealt with the Housing Authority of the City of Seattle at the time said contract was made knew, and now knows, that said organization is and was a wholly different organization from that of the Public Housing Administration of the United States of America.

IX.

That on or about November 12, 1953, the time of performance of the condition of said contract that buildings be removed and sites cleared was extended by the Housing Authority, City of Seattle, on request therefor by Century Investment Corporation, to January 15, 1954; that defendant Hartford Ac-

cident and Indemnity Company received no notice of said extension or request therefor and did not approve said extension which was granted at a time when the Housing Authority, City of Seattle had knowledge that buildings numbered 102 and 103 of project Wash-45302 were being offered for rental, on site, to the public contrary to the spirit and plain meaning of said contract.

X.

That on and after August 21, 1953, defendant Century Investment Corporation purported to convey four buildings in project Wash-45302, namely buildings 102, 103, 104, and 105, comprising 54 dwelling units, without imposing the condition or obligation that they be removed from site; that all said four buildings, at the present time, are situated on the sites where they were first constructed as temporary war housing buildings by the Public Housing Administration, and are presently being used for private commercial dwelling purposes and are occupied by paying tenants.

XI.

That the owners of each of said buildings and the real properties upon which each is situated are as follows:

a. Building 102, project Wash-45302, located on a portion of a street area and on lots 2, 3, 4, 5, 6, 33 and 34 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, and purportedly acquired by defendants

Virgil J. Pague from Century Investment Corporation on August 21, 1953, for the sum of \$1,932.00; that thereafter Virgil J. Pague acquired an interest in the lots, above described, underlying said building.

b. Building 103, project Wash-45302, located on a portion of a street area and on lots 10, 11, 12, 13, 29, 30 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, and purportedly acquired by defendant Virgil J. Pague from Century Investment Corporation on October 5, 1953, for the sum of \$1,932.00; that thereafter Virgil J. Pague acquired an interest in the lots, above described, underlying said building.

c. Building 104, project Wash-45302, located on a portion of a street area and on lots 14, 15, 16, 17, 18, 19, 20, 22 and 23 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington and purportedly acquired by defendants Arthur G. Barnett and wife and Donald F. Owens and wife on January 20, 1954, in two parts, to wit; one portion consisting of a laundry and service unit and one and a half dwelling units adjoining for the sum of \$1,715.09, from R. M. Scougal and F. T. Crow, who acquired same from Century Investment Corporation on September 2, 1953; the remainder of said building being acquired from Virgil J. Pague and his brother, Carl W. Pague, who had acquired same from Century Investment Corporation; that Carl W. Pague possessed no real interest in said building and that de-

fendants Barnett and Owens paid Virgil J. Pague the sum of \$4,698.00 for said portion of building 104; that on January 20, 1954, defendants Barnett and Owens and wives jointly acquired an interest in the lots, above described, underlying building 104.

d. Building 105, project Wash-45302, located on a portion of a street area and on lots 19, 20, 21, 22, 23 and 24 in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, and purportedly acquired by defendants Edward R. Ester and wife in November, 1954, from Carl W. Pague for the sum of \$3,590.00, who had acquired the same from Century Investment Corporation for the sum of \$1,932.00; that thereafter defendant Ester acquired an interest in the lots, above described, underlying said building. In addition to said buildings, there are now located on or below the surface of the land described above certain brick, concrete blocks and piling, foundation posts and concrete entrance walks, and certain Wash-45302 electric light and power, telephone, sewer and water main line connections are now effected at points on or near the above-described lands.

XII.

That each and all of the pieces of real estate, described in paragraph XI hereof as lots located in block 11, McLaughlin's Waterfront Addition to the City of Seattle, King County, Washington, are among the parcels of real estate taken by the condemnation proceedings referred to in paragraph II hereof; that none of the defendants herein possessed

an interest in said lands at the commencement of said proceedings, they having acquired their respective interests after the date of the contract sued upon in this action; that by Declaration of Taking filed in said civil action No. 1143 on June 15, 1945, and Judgment on Declaration of Taking entered therein on June 16, 1945, and by subsequent Judgments Fixing Compensation and Directing Funds to be Paid, entered in said action, the plaintiff herein was granted the right to renew said exclusive use without the consent of the owners of said land from year to year, not to exceed three years after the termination of the National Emergency as declared by the President of the United States; which national emergency was that declared to exist by presidential proclamation of September 8, 1939 (54 Stat. 2643); that concerning the parcels of land above innumeraled and upon which said buildings 102, 103, 104 and 105 are now located and have been continuously located, since they were originally constructed thereon, the plaintiff herein, has filed timely notice, yearly, of its intention to renew said exclusive use, the current use period extending to February 21, 1956.

XIII.

That defendants Arthur G. Barnett and wife and Donald F. Owens and wife admit and the evidence shows, that the acquisition of building No. 104 and the real estate upon which it was and is situated was a partnership venture between them and that Arthur G. Barnett attended to the details of the acquisition, and advised them of same; that Arthur G. Barnett

prior to said acquisition inquired of the said Louis Michaelson as to the status of said building and discussed the same with Virgil J. Pague, and other directors of Century Investment Corporation, and Edward R. Ester, and had full and complete knowledge of the contract obligation of Century Investment Corporation that said temporary dwelling building be removed from site and that he conveyed such knowledge to Donald F. Owens; that prior to said acquisition, defendants Barnett and wife and Owens and wife secured a preliminary title insurance report which indicated, as these defendants well knew, that parcels of land upon which building No. 104 was located were held for the exclusive use of the plaintiff herein.

XIV.

That prior to the acquisition of building No. 105, and the land upon which it was and is situated, defendant Edward R. Ester discussed the same with Virgil J. Pague, A. E. Sherman and with Louis Michaelson and had full and complete knowledge of the contract obligation of Century Investment Corporation that said temporary dwelling building be removed from site and that he received a preliminary title insurance report which indicated, as he well knew, that parcels of land underlying said buildings were held for the exclusive use of the plaintiff herein.

XV.

That each of the defendants herein who now assert ownership of buildings 102, 103, 104 or 105 be-

fore acquiring their respective interest and well knowing of the contract obligation of Century Investment Corporation to remove said buildings from site and well knowing that the exclusive use of the substantial portion of the land underlying said buildings was held for the exclusive use of the plaintiff, inquired of the said Louis Michaelson and endeavored to secure through him some express waiver of said contract obligation; that such a waiver was never obtained by any one or more of said defendants; that they, and each of them, after purporting to acquire their respective interests, and in an effort to secure an express waiver of said contract obligation, secured a resolution of the City of Seattle, Washington, whereby that municipality permitted said buildings to remain on site for a period of five (5) years, and by action of the Seattle Board of Public Works defendants now have, and plaintiff does not have and since Oct. 28, 1953 has not had, the use of the street area underlying said buildings, defendants having been granted said street use Dec. 9, 1953. Each of said buildings have by defendants been altered so as to comply with the City Code requirements.

XVI.

That at the conclusion of the trial of this cause and before argument, counsel for the plaintiff orally moved to dismiss from this action defendants A. E. Sherman and Jane Doe Sherman, his wife, Carl W. Pague and Jane Doe Pague, his wife, which motion was granted by the court, likewise Counsel's oral

motion to dismiss Geneva L. Pague, wife of Virgil L. Pague was granted.

Done In Open Court this 20th day of October, 1955.

/s/ JOHN C. BOWEN,

United States District Judge.

And from the foregoing Findings of Fact, the court enters the following:

Conclusions of Law

I.

That this is an equity proceeding.

II.

That the Court has jurisdiction over each and all of the defendants involved in this litigation.

III.

That the Court has jurisdiction over the subject matter of this litigation based upon Title 28, U.S.C., Section 1345 and Title 42, U.S.C., Section 1553.

IV.

That on July 14, 1953, the plaintiff herein, through the Public Housing Administration, an agency of the Housing and Home Finance Agency of the United States of America, entered into a valid contract in writing with the promoters and incorporators of the defendant, Century Investment Corporation, for the sale and removal of temporary

war housing buildings and site clearance, within a specified time, which temporary dwelling buildings are designated therein as buildings Nos. 101 through 110, Project Wash-45302; that the provisions of said contract, and all of them, and particularly those relating to removal of said buildings and site clearance, are clear, definite and unambiguous, and that said contract is fair, equal and just, not only in its terms, but in its circumstances; that in entering into said contract, the plaintiff's agency, the Public Housing Administration, was complying with the mandatory requirements of Section 313 of the Lanham Act, P.L. 849, 76th Congress, as amended (Title 42, U.S.C., Section 1553).

V.

That although the plaintiff did give to the Housing Authority, City of Seattle and Louis Michaelson, an employee of said organization, a limited, specially-appointed agency and authority to do certain specified things in connection with the letting of said contract, there never was any general agency from the plaintiff to said organization or to Mr. Michaelson with power broad enough to generally authorize said organization or Mr. Michaelson to waive any of the terms and conditions of said contract.

VI.

That after incorporation, the defendant Century Investment Corporation, by its acts and deeds, authorized and ratified each and all of the acts of its incorporators and of A. E. Sherman in entering

into said contract and is bound by each and all of the terms thereof and by each and all of the acts complained of in this action.

VII.

That after entering upon the work of completing said contract and accepting the fruits thereof, the defendant Century Investment Corporation breached the terms thereof in failing to remove buildings 102, 103, 104 and 105, and in failing to clear the sites upon which said buildings were located and in purporting to convey said buildings, on site, without any condition or obligation that they be demolished or removed from site as required by the express terms of said contract.

VIII.

That the breaches of contract by defendant Century Investment Corporation in failing to remove temporary dwelling buildings 102, 103, 104 and 105 of project Wash-45302, constitute irreparable injury to the plaintiff for which it had no adequate remedy at law because it enables the defendants who now claim ownership to operate said buildings for commercial dwelling purposes and other commercial purposes on land held in the exclusive use of the plaintiff, without its consent, and on the site where they were first constructed as temporary war housing buildings and by so doing the plaintiff is prevented from executing the mandate of Congress contained in Section 313 of the Lanham Act, P. L. 849, 16th Congress, as amended, (Title 42, U.S.C.,

Section 1553) ; that the plaintiff is therefore entitled to specific performance of said contract because of the extreme importance of the conditions and objects of said contract, all of which necessitate that said buildings be removed and that the contract be otherwise performed; and that this court should retain jurisdiction of this action until such buildings are removed and the sites upon which they stand are cleared as hereinafter specified.

IX.

That the defendant Hartford Accident and Indemnity Company should be dismissed from this action for the reason that the plaintiff herein was not the named obligee on the indemnity bond with said defendant and therefore can not maintain this action against said defendant and for the further reason that the extension of time for performance of the removal contract granted defendant Century Investment Corporation, without the consent or approval of defendant Hartford Accident and Indemnity Company constituted a material variance of the contract of surety, increasing the risk assumed by said defendant which discharged its liability.

X.

That the defendants other than Century Investment Corporation now claiming ownership to any of said buildings Nos. 102, 103, 104 and 105 which have not been removed from sites pursuant to the terms of said contract, acquired no better title to said building or buildings than Century Investment

Corporation had and were not innocent purchasers of same without knowledge and notice of the contract expressed requirement that said buildings be removed from the site upon which they were situated at the time the contract between the plaintiff's agency and the defendant Century Investment Corporation was entered into, and therefore the plaintiff is entitled to specific performance of said contract as against each and all of said present purported owners for the same reasons as stated in paragraph VIII hereof; and that the court should retain jurisdiction of this action until such buildings are removed and the sites upon which they now stand are cleared as the contract required; that Century Investment Corporation and each of the defendants now asserting ownership to each of said buildings should immediately give notice to all tenants to vacate at earliest lawful date and should remove the same from its present site and clear such site by a date to be fixed by the court, such site clearance to be accomplished as follows:

- (1) Remove buildings with wood floors down to ground level, including wood, brick or concrete block foundation posts or piers; remove all concrete, including slabs and entrance walks, upon and beneath the surface of the ground;

- (2) Take down, preserve, and replace as directed by owner of same, telephone, telegraph or other wires or fences and their appurtenant poles or posts or other interferences which may

obstruct the removal of the buildings; excepting those serving buildings not included in this contract;

(3) Have all services, such as water, gas, steam, electricity and telephones, disconnected at the service mains in accordance with the rules and regulations of the owners of the utility involved or the local municipality. Securely cap and seal all storm and sanitary sewers leading from structures to be removed and backfill only after inspection by a person named in four (4) below. Cap water service line at foot of riser to dwelling. Preserve all active utilities traversing the project site.

(4) Remove all salvage (except as specified herein) and debris resulting from the operation and all tools and apparatus from the site, restore the site of the buildings, as far as possible, to its condition immediately prior to the removal of the buildings by filling solidly any holes or trenches resulting from the operation and leave the site clean and free from hazards, all to the satisfaction and approval of E. Stanton Foster, Regional Director P.H.A., or George Weis, Realty Disposition Officer, P.H.A.; that all the structures, buildings, materials and things mentioned above are now located on or under the surface of the land described in par. XI of the foregoing Findings, and should be forthwith removed by defendants and this Court's decree should issue accordingly; and all

utility service to the lands, buildings and structures above described should be disconnected by defendants or at their expense.

XI.

That the plaintiff presently has, and at all times material to this action had, the exclusive use of the real estate underlying buildings Nos. 102, 103, 104 and 105 of project Wash-45302, excepting only certain street areas belonging to the City of Seattle, Washington; that said estate of exclusive use of said land was originally acquired by the plaintiff by condemnation proceedings had in civil action No. 1143, now pending in this court; that the right to same has not been terminated and that the plaintiff presently has the right to renew the same without the consent of, or notice to, the owners of said land by reason, particularly, of the terms and provisions of Section 301 of the Lanham Act (42 U.S.C., Section 1541) and Joint Resolution, being Public Law 450, c. 570, Act of July 3, 1952 (66 Stat. 332), and also Joint Resolution, being Public Law 12, c. 13, Act of March 31, 1953 (67 Stat. 18); that the plaintiff is therefore entitled to a decree restraining and enjoining any and all parties from interfering with the plaintiff's enjoinder of said exclusive use.

XII.

That the plaintiff has been damaged by the wrongful use of said buildings by the defendants from the time of said breaches of contract by defendant Century Investment Corporation, in using same for

commercial rental purposes to and including the present time and for such future time as said buildings remain on site and for the wrongful use of the land underlying said buildings, and defendants continue to so use said buildings and property which is for the exclusive use of the plaintiff, from said time of said breaches of contract to and including the present time; that the plaintiff is entitled to a complete accounting, to be performed under the direction of this court, of all revenues received from and current operating expenses incidental to such commercial uses to determine monetary damages sustained by the plaintiff on account of the alleged breach of contract herein, and that the court should retain jurisdiction of this action for these reasons and should fix a date for the hearing on same.

XIII.

That each and all of the cross-complaints brought by one or more of the defendants against the plaintiff herein, should be dismissed.

Done in Open Court this 20th day of October, 1955.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved by:

/s/ JOHN A. ROBERTS, JR.,

Assistant United States Attorney, of Counsel for Plaintiff.

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

ORDER DIRECTING REFERENCE AND
APPOINTING SPECIAL MASTER

This cause having proceeded to trial and the court having heretofore entered its Findings of Fact and Conclusions of Law, and having concluded that the matter of the accounting of funds received by each of the defendants from the unauthorized commercial use of the temporary buildings involved in this action should be referred to a Special Master to settle the same and report thereon, before the court enters its final decree, and the court being fully advised in the premises, now therefore,

It Is Ordered that the accounting of funds received by each of the defendants herein from the unauthorized commercial use of buildings 102, 103, 104, and 105, P.H.A. project Wash-45302, whose respective interests are enumerated in the Findings of Fact and Conclusions of Law entered herein, is hereby referred to Don S. Griffith, of Seattle, Washington, as Special Master, to hear the parties and their evidence, and to report to this court his findings of fact and conclusions thereon as to the total profit received by each of the defendants from July 14, 1953, to the date of such report, together with such parts of the evidence as any party may request in writing.

It Is Further Ordered that the accounting shall be made from original records and that the total profit above referred to shall be the difference between the total gross revenue received from the

commercial use of each of said buildings and the current or normal operating expenses of each; except that said expenses may also include depreciation, based on current Internal Revenue Service useful life standards, for the minimum capital expenditures only, necessarily incurred in conforming said buildings to requirements of the City of Seattle, Washington. The master shall further find and report to the Court the portion in dollars and cents of the rental value contributed by the personal property furnished by defendants.

It Is Further Ordered that the Special Master shall report his findings and conclusions to this court within thirty days of the entry of this order, and the court hereby expressly postpones the entry of a Final Decree in this action pending receipt of such report.

It Is Further Ordered that all compensation of, and reasonable costs incurred by, the Special Master shall be determined by the Court and taxed against the defendants herein.

Done in Open Court this 21st day of October, 1955.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented and Approved by:

/s/ JOHN A. ROBERTS, JR.,

Assistant United States Attorney, of Counsel for Plaintiff.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

REPORT OF SPECIAL MASTER

* * *

EXHIBIT C

Edward R. Ester

Statement of Income

For the period May 1, 1954, to November 16, 1955
(On the cash basis of accounting)

	Period 5-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Rentals received	\$8,441.75	\$343.35	\$8,785.10
Operating expenses:			
Maintenance, labor	985.04	50.00	1,035.04
Maintenance, materials	782.94	49.29	832.23
Electricity	543.12	68.40	611.52
Fuel	358.60		358.60
Supplies	188.73	8.87	197.60
Insurance	68.15	8.98	77.13
Water	65.07	21.10	86.17
Real estate taxes	58.06		58.06
Advertising	36.07	8.58	44.65
Truck expenses, pro-rated amount	186.33	64.36	250.69
Total operating expenses..	\$3,272.11	\$279.58	\$3,551.69
Income from operations before provision for depreciation	\$5,169.64	\$ 63.77	\$5,233.41

Provision for depreciation:

Building improvements	\$ 732.60	\$ 62.43	\$ 795.03
Equipment, operating	698.14	58.12	756.26
Equipment, construction, pro-rated amount	16.59	4.62	21.21
	<u>\$1,447.33</u>	<u>\$125.17</u>	<u>\$1,572.50</u>
Net income	<u>\$3,722.31</u>	<u>\$(61.40)</u>	<u>\$3,660.91</u>

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL REPORT OF SPECIAL MASTER

* * *

II.

A. Findings of Fact:

That defendants Arthur G. Barnett and wife and Donald F. Owens and wife have received gross revenues from the operation of building 104 for the period commencing June 1, 1954, and ending November 16, 1955, in the amount of \$13,097.35 and during such period have made allowable expenditures in the aggregate amount of \$7,814.54; that the amount of said gross revenue attributable to personal property belonging to the said Arthur G. Barnett and wife and Donald F. Owens and wife, and used in said building is the sum of \$1,573.50; that

each of the above items are particularly described in the annexed statement marked "Exhibit B" which is incorporated herein by this reference.

B. Conclusions of Law:

That defendants Arthur G. Barnett and wife and Donald F. Owens and wife, have received a profit from the unauthorized commercial use of building 104, for the period indicated above, in the amount of \$5,282.81, of which \$1,573.50 represents revenue from personal property owned by them and used in the operation of said building.

C. Comments:

The comments made in paragraph I hereof are adopted herewith.

III.

A. Findings of Fact:

That defendants Edward R. Ester and wife have received gross revenue from the operation of building 105 for the period commencing May 1, 1954, and ending November 16, 1955, in the amount of \$8,785.10 and during such period have made allowable expenditures in the aggregate amount of \$5,020.51; that the amount of said gross revenue attributable to personal property belonging to the said Edward R. Ester and wife and used in said building is the sum of \$1,332.00; that each of the above items are particularly described in the annexed statement marked "Exhibit C," which is incorporated herein by this reference.

B. Conclusions of Law:

That defendants Edward R. Ester and wife have received a profit from the unauthorized commercial use of building 105, for the period indicated above, in the amount of \$3,764.59, of which \$1,332.00 represents revenue from personal property owned by them and used in the operation of said building.

C. Comments:

The comments made in paragraph I hereof are adopted herewith.

* * *

Respectfully submitted,

/s/ DON S. GRIFFITH,
Special Master.

EXHIBIT B

Barnett and Owens

Statement of Income

For the period June 1, 1954, to November 16, 1955
(On the cash basis of accounting)

	Period 6-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Rentals received	\$11,912.35	\$1,137.50	\$13,049.85
Income from washing machines	35.00		35.00
Other income, refunds, etc.	12.50		12.50
Gross income	\$11,959.85	\$1,137.50	\$13,097.35

	Period 6-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Operating expenses:			
Fuel	\$ 2,357.68	\$ 298.82	\$ 2,656.50
Maintenance & repairs..	1,126.64	68.18	1,194.82
Insurance	269.53	20.88	290.41
Water	243.50	29.10	272.60
Electricity	153.88	22.76	176.64
Real estate taxes	158.37		158.37
Advertising	123.94	5.61	129.55
Accounting services	69.75		69.75
Telephone	45.72		45.72
Manager's services	35.00	35.00	70.00
Social security taxes.....	23.96	5.33	29.29
Bank charges	19.42	1.45	20.87
Unemployment compensation	16.74	3.59	20.33
Miscellaneous	11.50		11.50
	<hr/>	<hr/>	<hr/>
Total operating expenses	\$ 4,655.63	\$ 490.72	\$ 5,146.35
	<hr/>	<hr/>	<hr/>
Income from operations before provision for depreciation	\$ 7,304.22	\$ 646.78	\$ 7,951.00
	<hr/>	<hr/>	<hr/>
Provision for depreciation:			
Building improvements \$	1,653.24	\$ 149.39	\$ 1,802.63
Equipment	789.62	75.94	865.56
	<hr/>	<hr/>	<hr/>
	\$ 2,442.86	\$ 225.33	\$ 2,668.19
	<hr/>	<hr/>	<hr/>
	1,673.42	144.44	1,817.86
Net income	\$ 4,861.36	\$ 421.45	\$ 5,282.81
	<hr/> <hr/>	<hr/> <hr/>	<hr/> <hr/>

Barnett and Owens

Reconciliation of Income as Reported by Defendants
To September 30, 1955

Net income to 9/30/55 per Master's statement	
annexed	\$4,861.36
Net loss to 9/30/55 per defendant's statement.....	(994.36)
	<hr/>
Reduction, summarized below	\$5,855.72
	<hr/> <hr/>
Summary of deductions disallowed by Master:	
1. Interest paid on bank loans.....	\$1,031.94
2. Interest paid on original purchase contract.....	325.34
3. Depreciation:	
On original building cost and improvements.....	4,518.11
On equipment	400.13
4. Miscellaneous adjustments	50.50
Less expenditures allowed as capital improvements	
in original report now allowed as expenses.....	470.30
	<hr/>
	\$5,855.72
	<hr/> <hr/>

EXHIBIT C

Edward R. Ester

Statement of Income

For the period May 1, 1954, to November 16, 1955
(On the cash basis of accounting)

	Period 5-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Rentals received	\$8,441.75	\$343.35	\$8,785.10
Operating expenses:			
Maintenance, labor	756.62	50.00	806.62
Maintenance, materials..	230.58	49.29	279.87
Electricity	543.12	68.40	611.52
Fuel	358.60		358.60

	Period 6-1-54— 9-30-55	Period 10-1-55— 11-16-55	Totals
Supplies	188.73	8.87	197.60
Insurance	68.15	8.98	77.13
Water	65.07	21.10	86.17
Real estate taxes.....	58.06		58.06
Advertising	36.07	8.58	44.65
Truck expenses, pro-rated amount	618.07	64.36	682.43
Total operating expenses	<u>\$2,923.07</u>	<u>\$279.58</u>	<u>\$3,202.65</u>
Income from operations before provision for depreciation	\$5,518.68	\$ 63.77	\$5,582.45
Provision for depreciation:			
Building improvements..	958.69	81.70	1,040.39
Equipment, operating ..	698.14	58.12	756.26
Equipment, construction pro-rated amount	16.59	4.62	21.21
Net income	<u><u>\$3,845.26</u></u>	<u><u>\$(80.67)</u></u>	<u><u>\$3,764.59</u></u>

Edward R. Ester

Reconciliation of Income as Reported by Defendants
To September 30, 1955

Net income to 9/30/55 per Master's statement annexed	\$3,845.26
Net loss to 9/30/55 per defendant's statement.....	(1,288.30)
Reduction, summarized below	<u><u>\$5,133.56</u></u>

Summary of deductions disallowed by Master:

- Expenditures claimed but not supported by
vouchers\$1,809.85
- Adjustment of expenditures as between capital
and operating expense 1,060.50

3. Depreciation :	
On buildings and improvements.....	2,033.07
On operating equipment	130.26
On construction equipment	40.97
4. Miscellaneous adjustments	58.91
	<hr/>
	\$5,133.56
	<hr/>

[Endorsed]: Filed January 18, 1956.

United States District Court, Western District of
Washington, Northern Division
No. 3804

UNITED STATES OF AMERICA,
Plaintiff,
vs.

CENTURY INVESTMENT CORPORATION, a
Corporation; HARTFORD ACCIDENT & IN-
DEMNITY COMPANY, a Corporation; A. E.
SHERMAN and JANE DOE SHERMAN, His
Wife; VIRGIL J. PAGUE and JANE DOE
PAGUE, His Wife; CARL W. PAGUE and
JANE DOE PAGUE, His Wife; ARTHUR G.
BARNETT and JANE DOE BARNETT, His
Wife; EDWARD R. ESTER and JANE DOE
ESTER, His Wife, and DONALD F. OWENS
and JANE DOE OWENS, His Wife,
Defendants.

EXCEPTIONS OF VIRGIL J. PAGUE TO
SUPPLEMENTAL REPORT OF SPECIAL
MASTER

Defendant Virgil J. Pague excepts to the Supple-
mental Report of Special Master as follows:

1. This defendant excepts to the Finding in Paragraph I that the allowable expenditures are in the amount of \$20,519.39 for the reason that this figure fails to take into consideration the proper method of allowing depreciation on the improvements, inasmuch as depreciation is confined to expenditures to bring the buildings up to Code requirements, and excludes depreciation upon the buildings themselves which constitute personal property belonging to and furnished by this defendant, and further, that the basis of depreciation is a 30-year life, whereas the improvements would have a useful life of not to exceed 5 years, even if removal in accordance with the Court's indicated order is not required, because of limitations in the buildings permits by which the improvements were made, the resolution of the City Council permitting continuance of the buildings on site, and the arrangements whereby the street areas are occupied by the buildings. But if the Court's indicated order is to be carried out and the buildings are to be immediately removed from the site, the amount of depreciation allowed should include the entire unrecovered cost of improvements, as indicated on Exhibit "D" of the Master's Report in the amount of \$6,298.53.

2. Exception is further taken to the figure of \$20,519.39 previously mentioned representing Master's finding of amount of allowable expenditures, for the reason that there is excluded therefrom the various legal fees, the interest paid on original building cost, on building improvements and equip-

ment, these being the amounts shown on Exhibit "A" to the Master's Report as items disallowed.

3. Exception is taken to that portion of subparagraph B of Paragraph I of the Report of the Special Master, wherein the Master concludes that this defendant has received a profit of \$6,765.13 for unauthorized commercial use of buildings 102 and 103, for the reason that this figure fails to take into account the charge-off of the unrecovered cost of improvements as indicated in Exhibit "D" to the Master's Report, and is based upon an erroneous computation arrived at by the use of the figure of \$20,519.39 for allowable expenditures, which figure is erroneous in the respects pointed out in the preceding paragraphs hereof.

4. Exception is taken to that portion of subparagraph B of Paragraph I wherein it is concluded that \$828.00 represents revenue from personal property owned by this defendant and used in the operation of said buildings, for the reason that said figure is arbitrary, not based upon any evidence or stipulation, and fails to include that portion of the income derived from buildings owned by this defendant and constituting personal property.

5. Exception is further taken to the Report because it fails to segregate and credit to this defendant that portion of the income attributable to real property included within street areas, in which plaintiff has no interest but in which this defendant has sole right to possession.

6. Exception is taken to that portion of subparagraph C of Paragraph I of the Master's Supplemental Report wherein depreciation of allowable capital improvements has been determined on a 30-year useful life basis, for the reason that a 30-year useful life basis is not justified in this case and is not in accordance with the provisions of Bulletin F of the Internal Revenue Service, which in part provides:

“The useful life of a building for business purposes depends to a large extent on the suitability of the structure to its use and location, its architectural quality, the rate of change in population, the shifting of land values, as well as the extent of maintenance and rehabilitation.”

Further, the Master is in error in using a 30-year useful life basis, for the reason that he is applying the same to improvements rather than to the buildings themselves, whereas Bulletin F of the Internal Revenue Service, upon which he has based his computations, provides for a shorter average useful life for various items of building equipment such as are involved here, including, for example, plumbing, lighting systems and fixtures, all of which are given an average useful life of less than 30 years, being 20 years in the case of wiring, 15 years in the case of faucets, 20 years in the case of iron hot water pipes, as examples, and the 30-year average useful life basis is wholly unrealistic and out of harmony with

the rules for the computation of Internal Revenue depreciations.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Virgil J. Pague;

By LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed January 27, 1956.

United States District Court, Western District of
Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, et
al.,

Defendants.

MOTION OF VIRGIL J. PAGUE TO STRIKE
SUPPLEMENTAL REPORT OF SPECIAL
MASTER

Defendant Virgil J. Pague moves to strike the supplemental report of special master for the reason that the same is a report of irrelevant facts having no relation to damages due plaintiff or to any issue

properly before the court in this case. This motion is also made for the reason that the report of special master has not been made nor filed in conformity with the rules applicable thereto. This motion is made for the reason that the report is made upon a fundamentally wrong basis, having been made wholly without reference to the value of the plaintiff's leasehold or damage thereto or to any monetary damage suffered by plaintiff by any breach of contract or action of any of the defendants, and further for the reason that the rule of court relative to special masters has not been complied with in the filing of the transcript herein.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Defendant

Virgil J. Pague,

By /s/ LYLE L. IVERSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1956.

[Title of District Court and Cause.]

SUPPLEMENTAL OBJECTIONS OF DEFENDANTS BARNETT AND OWENS, AND DEFENDANT ESTER TO SPECIAL MASTER'S REPORTS, INCLUDING SECOND SUPPLEMENTAL MEMORANDUM—TRANSCRIPT OF PROCEEDINGS BEFORE SPECIAL MASTER FILED MARCH 9, 1956.

* * *

IV.

That attached hereto and marked Defendants Barnett, Owens and Ester's Exhibit "J" and entitled "Comparative Statement of Income and Expense for Virgil J. Pague, Barnett and Owens and Edward R. Ester," prepared from the Special Master's Supplemental Report and Exhibits, and showing the comparative percentages of expenses and net profit to gross income. This is based on the Master's determinations and accounting as to the defendants and shows the comparisons between the defendants on a percentage basis. We summarize here the important percentages and refer to Exhibit "J" which shows the detailed breakdown:

Percentage of Operating Expense to Gross Revenue:

Pague allowed 68.003% of gross revenue \$27,284.52.

Barnett and Owens 39.293% of \$13,097.35.

Ester 36.455% of \$8,785.10.

Although the Barnett and Owens gross income is 48.003% of Pague's the Master's method of accounting and allocation of operating expenses (less depreciation to Pague and none to Barnett and Owens, but disallowing operating expenses to Barnett and Owens) the percentage results in being altered as to net income so that instead of the same ratio of 48.003% applying to net income, it jumps to 78.089%. Thus Barnett and Owens end up with a profit, according to the Master, of \$5,282.81 and Pague with \$6,765.13. To have been consistent (and without discrimination based on the peculiarities of accounting) the net income of Barnett and Owens should have been not over 48.003% of \$6,765.13, or approximately \$3,247.47.

Relating said Exhibit J to defendant Ester—although the gross income of Ester is 32.198% as compared with Pague's the net income appears to jump to 55.647% because the Master ends up with a net income of \$6,765.13 for Pague and \$3,764.59 for Ester as a result of disallowing operating expense items and charging off some of said items to depreciation. To be consistent the comparative percentage applying on gross income of 32.198% as applied to net income would have resulted in a figure of \$2,178.24.

V.

A. Defendant Ester objects to the arbitrary action of the Master in disallowing items submitted by Ester, unsupported by vouchers or checks, while allowing similar items as hereinafter set forth, to defendant Pague:

Exhibit "G" Document 114:

Page 0001 entitled Supplemental Memorandum
—Transcript of Proceedings before Special
Master filed Feb. 27, 1956:

6 items following date 12/53 totalling..\$557.11

Page 0002 3/22/54 carpenter labor allo-	
cated by journal entry only.....	159.02
11/20/53 Carpenter labor.....	76.00
“ Carpenter labor.....	235.00
“ Materials allocated by	
journal entry only.....	37.10
	<hr/>
	\$507.12

Page 0003 under column "caretaker's
wages," no symbol, quotation, "y" or
"dot" used by Master to indicate inspec-
tion of checks or invoices.....\$608.00

Page 0003 under column "R and M" (re-
pair and maintenance):

\$14.38 —by journal voucher transfer only

11.28 —held out from rents, no receipts

17.07 — “ “ “ “ “ “

50.70)

14.99)—journal voucher transfer, no ex-
planation

11.70 —held out from rent—WAHL

2.00 —cash out

(R and M cont.) \$2100.00—al-
location from Uptown Motors
1/6 of monthly payment or \$100
a month)

Page 0003 under column "other" (no date)
 allowed journal voucher, hose and sprinkler, without receipt.....\$ 14.43
 (no date) held out from rent, no receipts 7.46
 (no date) commission..... 250.00

This shows example of inconsistent and capricious action of the Master in denying to defendant Pague what the Master allowed to defendants Barnett and Owens.

B. Page 0003

3/12/54 disallowed Jesse Epstein
 legal expenses\$250.00

VI.

Defendants Barnett and Owens and Ester object to the Master's allowance of repair items similar to items claimed by Barnett and Owens and Ester, but arbitrarily capitalized by the Master. Thus, by now allowing the deductions in the year when allowed to Pague as expenses against gross income, the Master by arbitrary classification, put 80% of the items by the sum of the digits method ahead to be allowed over an imaginary period of some twenty years, remaining out of the thirty years useful life.

We refer to document 114—Exhibit "G";

A. Page 0003 under column marked "R and M" (repair and maintenance), the following appears:

1. Under date of July 31, 1954, three windows were allowed as "R and M" expense at a cost of

\$8.42 to Pague, under date of 2/11/54, glass, \$7.08 allowed Pague as operating expense, whereas on a similar item affecting Ester, Exhibit "I," page 0008, \$32.80 was capitalized, and a similar item appearing at page 0012, \$9.27 under date of 12/6/54 was capitalized.

2. Under date of 12/31/53, electrical repairs, Pague was allowed \$226.91 as "R and M" expense whereas affecting Barnett and Owens a similar item appearing in Exhibit "F"-1, page 0001, the following items were capitalized: 3/18/54—\$47.98; 6/4/54—\$200.00; 6/29/54—\$30.87.

3. Under date of 3/54, repair motor for boiler room, \$86.52 was allowed to Pague which affecting Ester on Exhibit "I," page 0019, item 3, \$50.00 was disallowed.

4. Under date of 7/54, lumber and burner repair was allowed Pague, \$45.01 as repairs. On Exhibit "F-1" pages 0001 and 0002 there are eight lumber items totalling \$92.78 which were capitalized.

5. Under date of 8/54 window shades, \$38.56, allowed Pague as repairs whereas affecting defendant Ester, Exhibit "I," page 0012, 7/26/54, \$2.86 was capitalized, and as affecting Barnett and Owens under Exhibit "F-1," page 0001, date 8/4/54, \$36.05 was capitalized and also capitalized on page 0002, date 6/54 was an item of \$16.00.

6. Refrigerator repair \$206.46 allowed Pague
 " " 236.07 " " ,
 which indicates the Master allowing repair items

and allowing generally no repair items to defendants Barnett, Owens and Ester, but allocating most of the repair expenses as capital depreciable items.

7. 9/23/55 painting, \$634.18 allowed Pague for maintenance, whereas, affecting Ester, document 114, Exhibit "I," page 0004, there is attached a Pittsburgh receipt showing expense to Barnett, Owens and Ester, of which the amount of \$26.45 was charged to Ester, but capitalized by the Master, also as affecting Ester see Exhibit "H," page 0003 under date of 1/6/54 paid \$172.48 capitalized and under date of 2/9/54 paid \$117.50 capitalized. Affecting Barnett and Owens on Exhibit "F-1," page 0002 there are twelve items marked "painting," with a total of \$438.20 capitalized.

No date—new faucet installed, \$20.77, allowed Pague, whereas affecting Barnett and Owens, Exhibit "F-1," page 0002, three plumbing items appear \$1.72, \$10.82, \$6.17, totalling \$18.71 capitalized.

B. Under Document number 114, Exhibit "G," page 0003, allowed \$79.46 to defendant Pague as operating for a survey, instead of capitalized as a land expense; and also allowed three items \$5.10, \$20.40 and \$29.46 for garbage cans, as operating expense, while capitalizing same items against Ester, Document 114, Exhibit "I," page 0004, \$20.00; and page 0001, June 8, 1955, \$13.92.

VII.

In the Special Master's original Report, Ester was allowed as operating expense, all the labor and

material items for which he had receipts; and Ester was requested to produce receipts for items disallowed. Ester produced receipts, and other evidence stipulated as acceptable by Plaintiff's counsel at the hearing before the Master on January 9, 1956. The Master in his Supplemental Report added the additional items for which receipts were filed and transferred 70% thereof from operating to capital improvements. In addition, the Master disallowed and ignored the stipulated items. Therefore, the defendant Ester objects to the arbitrary capitalization of 70% of the labor, totalling \$1,765.46 from the date of occupancy of the buildings to September 30, 1955, and materials totalling \$538.02 as appearing on Document 116, page 0010, and to the disallowance of 100% of these items as operating expense, to the disallowance of the stipulated items, and to the capricious, unjust and discriminating accounting actions of the Master.

* * *

X.

The Master has arbitrarily used a thirty-year basis for depreciation on a sum of the digits method. As an example of why this is unjust, defendants Barnett and Owens refer to their repair and substitution of a better heating system based on paying off the cost of the same during the five years allowed under City of Seattle Resolution and Building permits. The testimony shows that the percentage of saving, estimated on an engineering basis by defendant Owens, who is a heating engineer,

employed in a heating business, had calculated correctly that the cost of the same could be paid off in five years. This is against the Master's speculation that the same is chargeable on the balance of thirty-year life and furnishes proof that the same should be charged off on a five-year depreciation at the very least. See Exhibit J showing fuel cost on the part of the defendant Pague of 33.224% compared to Barnett and Owens of 20.283%, saving of about 39% of fuel costs by Barnett and Owens per unit. Thus the Master's method penalizes Barnett and Owens for some reason not understandable to these defendants.

Dated this 23rd day of March, 1956.

/s/ ARTHUR G. BARNETT,

/s/ ALEC DUFF,

Attorneys for Defendants
Barnett and Owens.

/s/ MORRIS A. ROBBINS,

Attorney for Defendant Estate

DEFENDANTS EXHIBIT "J"
(Of Barnett & Owens, and Ester)

Comparative Statement of Inome & Expense for Virgil J. Pague, Barnett & Owens & Edward R. Ester
 Prepared from Master's Amended Report with Comparative Percentages of Expenses to Gross Income

	Virgil J. Pague		Barnett & Owens		Edward R. Ester	
	September 1, 1953, to November 16, 1955	% of Gross Income	June 1, 1954, to November 16, 1955	% of Gross Income	May 1, 1954, to November 16, 1955	% of Gross Income
	Amount		Amount		Amount	
Rentals Received	\$27,043.02		\$13,049.85		\$8,785.10	
Miscellaneous Receipts	241.50		47.50			
Gross Income	\$27,284.52	100.000%	\$13,097.35	100.000%	\$8,785.10	100.000%
Operating Expenses:						
Fuel	\$ 9,064.92	33.224%	\$ 2,656.50	20.283%	\$358.60	
Truck Expense					682.43	\$1,041.03 11.850%
Maintenance and Repair..	\$4,823.07		\$1,194.82		279.87	
Supplies					197.60	
Maintenance Labor					806.62	
Caretaker's Wages	608.00		70.00			
Payroll Taxes	5,431.07	19.905%	49.62	1,314.44 10.036%	1,284.09	14.616%
Electricity	1,741.75	6.384%	176.64	1.349%	611.52	6.961%
Water	644.92	2.363%	272.60	2.081%	86.17	.981%
Telephone			45.72	.349%		
Accounting			69.75	.533%		
Land Rent	1,000.00	3.665%				
Commission Paid	250.00	.916%				
Real Estate Taxes.....	211.40	.775%	158.37	1.209%	58.06	.661%
Survey	79.46	.291%				
Insurance	40.29	.148%	290.41	2.217%	77.13	.878%
Advertising			129.55	.989%	44.65	.508%
Bank Charges			20.87	.159%		
Miscellaneous	90.54	.332%	11.50	.088%		
Total Operating Expenses.....	\$18,554.35	68.003%	\$ 5,146.35	39.293%	\$3,202.65	36.455%
Depreciation	1,965.04	7.202%	2,668.19	20.372%	1,817.86	20.693%
Total Expenses	\$20,519.39	75.205%	\$ 7,814.54	59.665%	\$5,020.51	57.148%
Net Income	\$ 6,765.13	24.795%	\$ 5,282.81	40.335%	\$3,764.59	42.852%

Note: The Special Master found that defendant Virgil J. Pague's Gross Receipts (\$27,284.52) yielded a Net Profit of \$6,765.13 or 24.795%. Applying the same percentage to Barnett & Owens and Ester's Gross Receipts would give the following result:
 Barnett & Owens 24.795% of \$13,097.35=\$3,247.47,
 Edward R. Ester 24.795% of \$ 8,785.10=\$2,178.27.

Receipt of copy acknowledged.

[Endorsed]: Filed March 23, 1956.

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on before the undersigned Judge of the above-entitled Court on April 21, 1956, for entry of Supplemental Findings of Fact and Conclusions of Law and Judgment, and the Court having heretofore entered an Order approving and confirming the supplemental report of Special Master, filed herein on January 18, 1956, and the plaintiff, United States of America, being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and John A. Roberts, Jr., Assistant United States Attorney for said district, and the said defendants, being the owners of the real estate involved in this action and indentified in Paragraph XI of the Findings of Fact and Conclusions of Law entered by the Court on October 20, 1955, appearing in person and by their respective counsel of record herein, and the Court having heard arguments of counsel and being fully advised in the premises, does now, from a preponderance of the evidence, by way of supplement and amendment of the Findings of Fact and Conclusions of Law heretofore entered herein on October 20, 1955, make the following supplemental and amendatory:

Findings of Fact

I.

That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the

land upon which the buildings, furniture, furnishings, equipment and appurtenances involved herein have, at all times material to this action, been and are now located.

II.

That the plaintiff has not fully sustained that burden, in that, although the judgment on the declaration of taking and the judgments awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said buildings and clear the sites upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate.

III.

That the present and only estate in the land here in question now claimed by the plaintiff expires on July 1, 1956, and the plaintiff has no present intention of renewing or extending said estate by virtue of any existing judgment or order of this Court; that upon that date, the defendants, so far as existing judgments and orders of court are concerned, will be entitled to the exclusive possession of said real estate, and it would be more burdensome to them, than advantageous to the plaintiff, to require the defendants to specifically perform this Court's

previous contemplated order of building removal and site clearance. The Court finds that within about seventy (70) days of April 21, 1956, the defendants would have the right of exclusive possession of said lands and the right to move said buildings back on said lands; that from practical and compensatory standpoints the Court now finds that it is more just, considering the material equities and the law to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all of the requirements of the contract of sale.

IV.

As to the property and property interests described in Par. XI, Subpar. a and b of the Findings of Fact entered herein October 20, 1955, that a fair, reasonable, and just award of damages to be awarded to the plaintiff and against the defendant Virgil J. Pague and defendant Century Investment Corporation jointly and severally, is the sum of Five Thousand Nine Hundred Thirty-seven and 13/100 Dollars (\$5,937.13).

V.

As to the property and property interests described in Par. XI, Subpar. c of the Findings of Fact entered herein October 20, 1955, that a fair, reasonable, and just award of damages to be

awarded to the plaintiff and against the defendants Arthur G. Barnett and the marital community consisting of him and Virginia N. Barnett, his wife, and Donald F. Owens and the marital community consisting of him and Jean Owens, his wife, and defendant Century Investment Corporation, jointly and severally, is the sum of Three Thousand Seven Hundred Nine and 31/100 Dollars (\$3,709.31).

VI.

As to the property and property interests described in Par. XI, Subpar. d of the Findings of Fact entered herein October 20, 1955, that a fair, reasonable, and just award of damages to be awarded to the plaintiff and against the defendants Edward R. Ester and the marital community consisting of him and Lorraine M. Ester, his wife, and defendant Century Investment Corporation, jointly and severally, is the sum of Two Thousand Four Hundred Thirty-two and 59/100 Dollars (\$2,432.59).

VII.

That the Findings of Fact and Conclusions of Law entered herein on October 20, 1955, are reaffirmed in their entirety except that they are modified only as to the specific details enumerated herein.

VIII.

That a reasonable fee for services rendered by Don S. Griffith, Special Master herein, is the Sum of Two Thousand Five Hundred Dollars (\$2,500.00) together with the reasonable sum of Eighty-three Dollars (\$83.00) incurred by the Special Master for

the services of Mr. E. E. Lescher, court reporter; that one-fourth of these amounts should be paid by the plaintiff and three-fourths of said amounts should be paid by the defendants, and each of them, and in this regard the defendants' obligation shall be joint and several. That any and all other costs incurred in this action shall be paid by the parties incurring same.

That although as the Special Master found defendant Century Investment Corporation did not directly receive the profits of commercial use of the buildings, said defendant nevertheless is liable for all damages stated in paragraphs IV, V, and VI, above, and for three-fourths of the sums stated in paragraph VIII, above.

Done in Open Court this 26th day of April, 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

And from the foregoing, the Court now makes and enters the following:

Conclusions of Law

I.

That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings, furniture, furnishings, equipment and appurtenances herein involved have, at all times material to this action, been and are now located and that the plaintiff has not fully sustained

that burden and is therefore not entitled to an order of this Court compelling the present owners of the land involved herein to remove the buildings and clear the sites upon which they stand.

II.

That the plaintiff is entitled to be compensated by these defendants by way of damages for their failure to remove and clear the sites, and for their wrongful commercial use of, said buildings and to comply with the removal requirements of the contract of sale entered herein on July 14, 1953.

III.

That respecting Finding No. IV above, the plaintiff shall be awarded damages against the defendant Virgil J. Pague and defendant Century Investment Corporation, jointly and severally, in the sum of Five Thousand Nine Hundred Thirty-seven and 13/100 Dollars (\$5,937.13).

IV.

That respecting Finding No. V above, the plaintiff shall be awarded damages against the defendants Arthur G. Barnett and the marital community consisting of him and Virginia N. Barnett, his wife, and Donald F. Owens and the marital community consisting of him and Jean Owens, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Three Thousand Seven Hundred Nine and 31/100 Dollars (\$3,709.31).

V.

That respecting Finding No. VI above, the plaintiff shall be awarded damages against the defendants Edward R. Ester and the marital community consisting of him and Lorraine M. Ester, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Two Thousand Four Hundred Thirty-two and 59/100 Dollars (\$2,432.59).

VI.

That Don S. Griffith shall be awarded the reasonable sum of Two Thousand Five Hundred Dollars (\$2,500.00) together with the sum of Eighty-three Dollars (\$83.00) for his expenses and services as Special Master herein and that one-fourth of said amounts shall be paid by the plaintiff and three-fourths of said amounts shall be paid by the above-named defendants, and each and all of them, and in this regard the defendants' obligation shall be joint and several. That all other costs incurred in this action shall be paid by the parties incurring same.

Done in Open Court this 26th day of April, 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

Receipt of copy acknowledged.

Lodged April 25, 1956.

[Endorsed]: Filed April 26, 1956.

United States District Court, Western District of
Washington, Northern Division

No. 3804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTURY INVESTMENT CORPORATION, a
Corporation; HARTFORD ACCIDENT & IN-
DEMNITY COMPANY, a Corporation; A. E.
SHERMAN and JANE DOE SHERMAN, His
Wife; VIRGIL J. PAGUE and JANE DOE
PAGUE, His Wife; CARL W. PAGUE and
JANE DOE PAGUE, His Wife; ARTHUR G.
BARNETT and JANE DOE BARNETT, His
Wife; EDWARD R. ESTER and JANE DOE
ESTER, His Wife; and DONALD F. OWENS
and JANE DOE OWENS, His Wife,

Defendants.

JUDGMENT AND DECREE

This Matter having come on for entry of Judgment this day, pursuant to notice, after having proceeded to trial before the undersigned Judge of the above-entitled Court on the 7th day of September, 1955, on the Complaint of the plaintiff, as amended, and the answers thereto and cross-complaints of the respective defendants above named and the plaintiff, United States of America, being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and

John A. Roberts, Jr., Assistant United States Attorney for said district, and the said defendants and all of them, having each appeared by their respective counsel of record herein, and witnesses having been sworn, testimony taken, and evidence adduced, and the trial having continued from day to day until September 17, 1955, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, and thereafter having referred the matter of an accounting of funds received from the commercial use of the buildings described in the Findings of Fact and Conclusions of Law to a Special Master and the Master having filed his report and supplemental report and the Court having heard argument of counsel concerning same and having heretofore entered an Order confirming and adopting said supplemental report filed herein on January 18, 1956; and the Court having thereafter entered supplementary and amendatory Findings of Fact and Conclusions of Law, does now, therefore, being fully advised in the premises,

Order, Adjudge, and Decree as follows:

1. That on account of said contract of sale and off-site removal of buildings the plaintiff has been damaged by the wilful failure of the defendants, hereinafter named in this paragraph, to remove the buildings, described in the Findings of Fact and Conclusions of Law entered herein, and for their failure to clear the sites upon which they stand in accordance with the terms of the contract of sale entered into on July 14, 1953, all of the terms and

conditions of which are and were well known to these defendants, and for their wrongful commercial use of said buildings.

(a) That the plaintiff is hereby awarded reasonable damages and judgment against the defendant Virgil J. Pague and defendant Century Investment Corporation, jointly and severally, in the sum of Five Thousand Nine Hundred Thirty-seven and 13/100 Dollars (\$5,937.13);

(b) That the plaintiff is hereby awarded reasonable damages and judgment against the defendants Arthur G. Barnett and the marital community consisting of him and Virginia N. Barnett, his wife, and Donald F. Owens and the marital community consisting of him and Jean Owens, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Three Thousand Seven Hundred Nine and 31/100 Dollars (\$3,709.31);

(c) That the plaintiff is hereby awarded reasonable damages and judgment against the defendants Edward R. Ester and the marital community consisting of him and Lorraine M. Ester, his wife, and defendant Century Investment Corporation, jointly and severally, in the sum of Two Thousand Four Hundred Thirty-two and 59/100 Dollars (\$2,432.59).

2. That a fair, just, and reasonable fee for his services as Special Master herein is hereby awarded to Don S. Griffith in the sum of Two Thousand Five Hundred Dollars (\$2,500.00), together with Eighty-

three Dollars (\$83.00) incurred by him for the services of a court reporter; that one-fourth of said amounts, in the sum of \$645.75 shall be paid by the plaintiff and three-fourths of said amounts, in the sum of \$1,937.25, shall be paid by the defendants named in paragraphs 1 (a), (b), (c), hereinabove and each and all of them, and in this regard the defendants' obligation is joint and several.

3. That all other costs incurred herein shall be paid by the parties incurring same and all sums awarded the plaintiff herein shall bear interest forthwith after entry of this Judgment and Decree at the legal rate of 6% per annum until paid.

4. That defendants Hartford Accident & Indemnity Company, a corporation; Jane Doe Pague, whose true name is Geneva L. Pague; Carl W. Pague and Jane Doe Pague, his wife; and A. E. Sherman and Jane Doe Sherman, his wife, are hereby dismissed from this action without costs.

5. That each and all of the cross-complaints brought by one or more of the defendants against the plaintiff herein are hereby dismissed.

Done in Open Court this 26th day of April, 1956.

/s/ JOHN C. BOWEN,

United States District Judge.

Receipt of copy acknowledged.

Lodged April 25, 1956.

[Endorsed]: Filed April 26, 1956.

[Title of District Court and Cause.]

MOTION TO ALTER OR AMEND
JUDGMENT AND DECREE

Come now the defendants, Arthur G. Barnett, Donald F. Owens and Edward R. Ester, and their respective marital communities, and move to alter or amend the judgment and decree of the above-entitled Court entered on April 26, 1956, as follows:

I.

That paragraphs 1, 1-b and 1-c, on page 2, awarding damages against these defendants, and paragraph 2 on pages 2 and 3, assessing a portion of the Special Master's fee against these defendants, have no basis in law or in fact.

II.

That the judgment and decree should be altered or amended to dismiss this action against these defendants.

This motion is supported by the affidavit of Arthur G. Barnett and memorandum of authorities furnished by these defendants.

Dated this 2nd day of May, 1956.

/s/ ALEC DUFF, and

/s/ ARTHUR G. BARNETT,

Attorneys for Arthur G. Barnett and Donald F. Owens.

/s/ MORRIS A. ROBBINS,

Attorney for Edward R. Ester.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY—JUNE 4, 1956

Present: Hon. John C. Bowen, U. S. District Judge.

Court convenes at 10:00 a.m. on June 4, 1956, pursuant to the order of adjournment, and hears the following matters:

Now, on this 4th day of June, 1956, this cause comes on before the Court for hearing on motion of defendants Arthur G. Barnett Donald F. Owens, and Edward R. Ester to alter or amend the judgment and decree. John Roberts appears on behalf of the Government; Arthur G. Barnett appears on behalf of Barnett and Owens; Lyle L. Iversen appears for Century Investment Corporation, and Morris Robbins appears for Edward R. Ester.

The motion is called and the Court hears arguments of all counsel in the case. After hearing such arguments, the Court on its own motion amends, by interlineation, the judgment and decree entered in the case on April 26, 1956, by adding after "that" (page 2, line 8) the following words: "on account of said contract of sale and off-site removal of buildings," such interlined amendment, effective as of April 26, 1956, was made and initialed by the Court. The Court denies the motion as to each and all its parts as to each and all defendants, and further denies any and all other pending motions, and it is so ordered.

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEFENDANTS,
CENTURY INVESTMENT CORP., AND
VIRGIL J. PAGUE

Notice Is Hereby Given That Century Investment Corporation, a corporation, and Virgil J. Pague, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on April 26, 1956.

Dated at Seattle, Washington, this 27th day of June, 1956.

LYCETTE, DIAMOND &
SYLVESTER,

By /s/ LYLE L. IVERSEN,

/s/ LYLE L. IVERSEN,

Attorneys for Appellants and Cross-Appellants,
Century Investment Corp., and Virgil J. Pague.

[Endorsed]: Filed June 27, 1956.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL OF DEFENDANTS, ARTHUR G. BARNETT,
DONALD F. OWENS, AND EDWARD R. ESTER

Notice Is Hereby Given that Arthur G. Barnett and Virginia N. Barnett, his wife; Donald F. Owens

and Jean Owens, his wife; and Edward R. Ester and Lorraine M. Ester, his wife, defendants above named, hereby jointly appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree of the above-entitled Court signed April 26, 1956, and entered April 30, 1956, insofar as said judgment and decree affect these defendants.

Dated at Seattle, Washington, this 31st day of July, 1956.

ARTHUR G. BARNETT, and
ALEC DUFF,

By /s/ ARTHUR G. BARNETT,
Of Attorneys for Arthur G. Barnett and Donald
F. Owens.

/s/ VERNON W. TOWNE,
Attorney for Edward R.
Ester.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Arthur G. Barnett and the Marital community of him and Virginia V. Barnett; and Don-

ald F. Owens and the Marital Community of him and Jean Owens, two of the defendants above named, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as Surety, are held and firmly bound unto the United States of America in the sum of Three Thousand and no/100 (\$3,000.00) Dollars, for which sum well and truly paid, the undersigned Principal and Surety bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas, the Principals above named are desirous of appealing and are filing this bond pursuant to the order of the United States Court of Appeals for the Ninth Circuit in Cause No. 15219 dated the 14th day of August, 1956, entitled: "United States of America, Appellant, vs. Century Investment Corporation, et al., Appellees," fixing the amount of supersedeas bond for Cross-Appellants, Arthur G. Barnett and the Marital Community of him and Virginia V. Barnett; and Donald F. Owens and the Marital Community of him and Jean Owens, jointly in the sum of \$3,000.00.

Now, Therefore, the condition of the above obligation is such that if the said Principals shall prosecute their appeal to effect and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed, or if the judgment is affirmed and satisfied in full, such modification of the judgment and such costs, interest and damages as the Appellate

Court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 20th day of August, 1956.

Arthur G. Barnett and the Marital Community of him and Virginia V. Barnett,

By /s/ ARTHUR G. BARNETT.

Donald F. Owens and the Marital Community of him and Jean H. Owens,

By /s/ DONALD F. OWENS.

[Seal] AMERICAN BONDING COMPANY OF BALTIMORE,

By /s/ GUERTIN CARROLL,
Attorney in Fact.

Approved: 8/21/56.

/s/ JOHN A. ROBERTS, JR.,
Assistant U. S. Attorney;

/s/ CHARLES P. MORIARTY,
United States Attorney.

Bond approved: 8/21/56.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Edward R. Ester and the Marital Community of him and Lorraine M. Ester, one of the defendants above named, as Principal, and American Bonding Company of Baltimore, a Maryland corporation, as Surety, are held and firmly bound unto the United States of America in the sum of Two Thousand Five Hundred and no/100 (\$2,500.00) Dollars, for which sum well and truly paid, the undersigned Principal and Surety bind themselves, their heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Whereas, the Principal above named is desirous of appealing and is filing this bond pursuant to the order of the United States Court of Appeals for the Ninth Circuit in Cause No. 15219 dated the 14th day of August, 1956, entitled: "United States of America, Appellant, versus Century Investment Corporation, et al., Appellees," fixing the amount of supersedeas bond for Cross-Appellant, Edward R. Ester and the Marital Community of him and Lorraine M. Ester, in the sum of \$2,500.00.

Now, Therefore, the condition of the above obligation is such that if the said Principal shall prosecute his appeal to effect and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed,

or if the judgment is affirmed and satisfied in full, such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 20th day of August, 1956.

Edward R. Ester and the marital community of him and Lorraine M. Ester.

By /s/ EDWARD R. ESTER.

[Seal] AMERICAN BONDING COM-
 PANY OF BALTIMORE,

By /s/ GUERTIN CARROLL,
Attorney-in-Fact.

Approved 8/21/56.

/s/ JOHN A. ROBERTS, JR.,
Asst. U. S. Atty.

/s/ CHARLES P. MORIARTY,
U. S. Atty.

Bond approved 8/21/56.

/s/ JOHN C. BOWEN,
U. S. District Judge.

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the following original documents and papers in the file dealing with the action, together with minute entry of 6-4-56, as the record on appeal and cross-appeals to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Complaint, filed Oct. 4, 1954, with Exhibits A, B, and C attached.
2. Motion and Affidavit for Order to Show Cause, filed 10-6-54.
3. Order to Show Cause, filed Oct. 6, 1954.
4. Marshal's Return on Show Cause, and Summons, filed 10-11-54, Barnett, Owens and Ester.
5. Appearance of Gerald Shucklin for Deft. Geneva L. Pague, filed 10-12-54.
6. Marshal's Returns on Show Cause and Summons, Pague, Century Investment Corp., filed 10-13-54.

7. Marshal's Return on Summons, Ester, filed 10-14-54.

8. Appearance of Lycette, Diamond & Sylvester for defendants Pague, filed 10-14-54.

9. Appearance of Lycette, Diamond & Sylvester for Century Investment Corporation, filed 10-14-54.

10. Motion to Quash Order to Show Cause, filed 10-14-54.

11. Notice of hearing on above motion, filed 10-19-54.

12. Marshal's Return on Summons and Show Cause Order, Hartford Accident & Int. Co., Barnett, Owens, filed 10-19-54.

13. Motion and Affidavit for Continuance, filed 10-22-54.

14. Memo. of Defts. Pague on Motion to Quash, filed 10-22-54.

15. Appearance of Malcolm S. McLeod for Deft. Hartford Accident and Indemnity Company, and Sherman, filed 10-26-54.

16. Appearance of Arthur G. Barnett and Alec Duff for defendants Barnett and Owens, filed 10-26-54.

17. Motion Deft. Barnett and Owens to Dismiss Complaint, filed 10-26-54.

18. Motion Defts. Virgil J. Pague, et ux., to Dismiss Complaint, filed 10-28-54.

19. Motion Century Investment Corporation to Dismiss Complaint, filed 10-28-54.

20. Return of Defendants Ester to Show Cause Order, filed 10-29-54.

21. Motion Defts. Ester to Dismiss, filed 10-29-54.

22. Motion Deft. Geneva L. Pague to Dismiss, filed 10-29-54.

23. Return of Hartford Accident & Ind. Co. to Order to Show Cause, filed 11-1-54.

24. Notice of Hearing Above Motions, filed 11-2-54.

25. Memorandum of USA, filed 11-3-54.

26. Return to Order to Show Cause of Virgil J. Pague, et al., filed 11-3-54.

27. Return of Century Investment Corp. to Order to Show Cause, filed 11-3-54.

28. Memo. of Defts. Pague on Order to Show Cause, filed 11-4-54.

29. Return of Defts. Owens, and Barnett to Show Cause, filed 11-5-54, with Exhibits A, B, C, D, E and F attached.

30. Memo. of Defts. Donald F. Owens, et ux., and Arthur G. Barnett, et ux., filed 11-5-54.

31. Return to Order to Show Cause of Geneva L. Pague, filed 11-5-54.

32. Defts. Ester's Memo. on Show Cause, filed 11-5-54.

33. Answer of Defendants Ester, filed 11-12-54.

34. Answer of Hartford Accident & Ind. Co., filed 11-12-54.

35. Answer of Defendants Pague, filed 11-12-54.

36. Answer of Century Investment Corporation, filed 11-12-54.

37. Answer of Deft. Geneva L. Pague, filed 11-12-54.

38. Answer, Defenses, etc., of Defts. Owens and Barnett, et al., filed 11-12-54.

39. Answer of A. E. Sherman, filed 11-13-54.
40. Order Discharging Rule to Show Cause and Denying Motions to Dismiss, filed 11-16-54.
41. Answer of United States of America to Cross-Claim of Defendants Pague, filed 12-23-54.
42. Answer of United States of America to Cross-Claim of Defendants Ester, filed 12-23-54.
43. Motion of Defendants Pague and Century Investment Corporation to Vacate Setting, filed 1-21-55.
44. Notice of hearing above motion, filed 1-21-55.
45. Notice of Defendants Ester to Renewal of Lease, filed 2-10-55.
46. Marshal's Return on Order to Show Cause With Motion and Affidavit, Jane Doe Sherman, filed 2-10-55.
47. Marshal's Return on Summons and Complaint, Jane Doe Sherman, filed 2-10-55.
48. Marshal's Return on Summons and Complaint, A. E. Sherman, filed 2-10-55.
49. Marshal's Return on Order to Show Cause With Motion and Affidavit, A. E. Sherman, filed 2-10-55.
50. Notice of Defendants Century Investment Corporation and Virgil J. Pague for taking Deposition and Oral Examination of Louis Michaelson, filed 3-31-55.
51. Marshal's Return on Subpoena, Louis Michaelson, filed 4-7-55.
52. Deposition of Louis Michaelson on Behalf of Defendants Century Investment Corporation and Pague, filed 5-17-55.

53. Request of Defendant Century Investment Corporation for Admissions, filed 5-24-55.

54. Praeipie of Defendants Barnett and Owens for Issuance of Subpoenas, Orville C. Hatch, et al., filed 6-8-55.

55. Return on Subpoena, Wayne V. Brandon, filed 6-10-55.

56. Return on Subpoena, R. M. Scougal, filed 6-16-55.

57. Return on Subpoena, Orville C. Hatch, filed 6-16-55.

58. Request of Defendants Barnett and Owens for Admissions, filed 8-12-55.

59. Request of United States for Admissions, filed 8-13-55.

60. Request of United States for Admissions, filed 8-13-55.

61. Request of United States for Admissions, filed 8-13-55.

62. Praeipie of United States for Issuance of Subpoenas, Orville Cohen and Albert Rontai, filed 8-16-55.

63. Praeipie of United States for Issuance of Subpoena, A. E. Sherman, filed 8-16-55.

64. Marshal's Return on Subpoena, A. E. Sherman, filed 8-22-55.

65. Marshal's Return on Subpoenas, Orville Cohen and Albert Rontai, filed 8-22-55.

66. Answer of United States to Request for Admissions, filed 8-26-55.

66a. Praeipie of United States for Issuance of Subpoena, Sumner Smith, filed 9-2-55.

66b. Trial Memorandum of Defendants Ester, filed 9-2-55.

67. Motion of United States to Amend Complaint, filed 9-6-55.

68. Notice of United States for hearing above motion, filed 9-6-55.

69. Order Authorizing Plaintiff to Amend Complaint, filed 9-7-55.

70. Motion of United States to Amend Complaint, filed 9-7-55.

71. Order Authorizing Plaintiff to Amend Complaint, filed 9-7-55.

72. Memorandum of United States of Legal Points and Authorities, filed 9-7-55.

73. Trial Memorandum of Defendants Pague and Century Investment Corporation, filed 9-7-55.

74. Praeipe of United States for Issuance of Subpoena, Virgil J. Pague, filed 9-9-55.

75. Marshal's Return on Subpoena, Sumner Smith, filed 9-12-55.

76. Marshal's Return on Subpoena, Virgil J. Pague, filed 9-13-55.

77. Memorandum and Statement of Points of Defendants Barnett and Owens, filed 9-13-55.

78. Praeipe of United States for Issuance of Subpoenas, Charles W. Ross and Louis Michaelson, filed 9-13-55.

79. Marshal's Return on Subpoena, Louis Michaelson, filed 9-14-55.

80. Supplemental Trial Memorandum of United States, filed 9-16-55.

81. Memorandum of Hartford Accident and Indemnity Company, filed 9-17-55.

82. Marshal's Return on Subpoena, Charles W. Ross, filed 9-21-55.

83. Statement of Costs of Defendants A. E. Sherman and Jane Doe Sherman, his wife, to be Taxed Against United States, filed 10-1-55.

84. Statement of Costs of Defendant Hartford Accident and Indemnity Company to be Taxed Against United States, filed 10-1-55.

85. Notice of Taxation of Costs, filed 10-1-55.

86. Objections by Defendants Pague and Century Investment Corporation to Government's Proposed Findings of Fact and Conclusions of Law, filed 10-12-55.

87. Objections by Defendants Barnett and Owens and Edward Ester to Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed 10-19-55.

88. Findings of Fact and Conclusions of Law, filed 10-20-55.

89. Proposed Findings of Fact and Conclusions of Law of Plaintiff, filed 10-20-55.

90. Proposed Findings of Fact and Conclusions of Law of Plaintiff, filed 10-20-55.

91. Proposed Findings of Fact and Conclusions of Law of Defendant Pague, filed 10-20-55.

92. Proposed Findings of Fact and Conclusions of Law of Defendants Barnett and Owens, filed 10-20-55.

92a. Transcript of Oral Decision Sept. 17, 1955, filed 10-20-55.

93. Order Directing Reference and Appointing Special Master, filed 10-21-55.
94. Order on Stipulation, filed 10-31-55.
95. Report of Special Master, filed 12-16-55.
96. Memorandum Transcript of Proceedings Before Special Master, filed 12-27-55.
97. Motion of Defendant Virgil J. Pague to Strike Report of Special Master, filed 1-3-56.
98. Exceptions of Defendant Virgil J. Pague to Report of Special Master, filed 1-3-56.
99. Motion of United States to Confirm and Adopt Report of Special Master, filed 1-5-56.
100. Motion of United States to Fix Special Master's Compensation, filed 1-5-56.
101. Motion of Defendants Barnett and Owens to Strike Special Master's Report and Transcript, filed 1-5-56.
102. Exceptions of Defendants Barnett and Owens to Report of Special Master, filed 1-5-56.
103. Withdrawn by Court Order.
104. Motion of Defendants Century Investment Corporation and Virgil J. Pague to Strike Memorandum Transcript of Proceedings Before Special Master, filed 1-6-56.
105. Bulletin "F" of U. S. Treasury Department, Bureau of Internal Revenue, filed 1-6-56. (Later admitted as Plaintiff's Exhibit No. 37.)
106. Memorandum of Plaintiff in Support of Special Master's Report, filed 1-6-56.
107. Supplemental Report of Special Master, filed 1-18-56.

108. Exceptions of Virgil J. Pague to Supplemental Report of Special Master, filed 1-27-56.

109. Exceptions of Defendants Ester to Supplemental Report of Special Master, filed 2-1-56.

110. Objections by Defendants Barnett and Owens to Special Master's Original and Supplemental Report and Original Transcript filed Respectively, December 16, 1955, January 18, 1956 and December 27, 1955,—filed 2-1-56.

111. Reporter's Transcript of Proceedings Before Special Master on January 11, 1956, filed 2-23-56.

112. Motion of Defendants Barnett and Owens to Strike Special Master's Report, Transcript and Supplemental Report, filed 2-25-56.

113. Motion of Defendants Ester to Strike Special Master's Report, Transcript and Supplemental Report, filed 2-27-56.

114. Supplemental Memorandum—Transcript of Proceedings Before Special Master, filed 2-27-56.

115. Motion of Defendant Virgil J. Pague to Strike Supplemental Report of Special Master, filed 2-28-56.

116. Second Supplemental Memorandum—Transcript of Proceedings Before Special Master, filed 3-9-56.

117. Supplemental Objections of Defendants Barnett and Owens and Defendant Ester to Special Master's Reports, Including Second Supplemental Memorandum—Transcript of Proceedings Before Special Master Filed March 9, 1956—filed 3-23-56.

118. Memorandum of Plaintiff in Support of

Motion to Confirm Supplemental Report of Special Master, filed 4-12-56.

119. Affidavit of Don S. Griffith, filed 4-12-56.

120. Affidavit of Arthur G. Barnett, filed 4-19-56.

121. Affidavit of F. N. Cushman for United States in Opposition to Motion of Defendant Barnett, filed 4-19-56.

122. Second Supplemental Trial Memorandum of Plaintiff, filed 4-19-56.

123. Affidavit of Edward R. Ester, filed 4-19-56.

124. Supplemental Trial Memorandum of Defendants Barnett and Owens, filed 4-20-56.

125. Memorandum of Defendants Pague on Non-Payment of Taxes by Government, filed 4-20-56.

126. Order Overruling Objections and Confirming Supplemental Report of Special Master, filed 4-21-56.

127. Supplemental Findings of Fact and Conclusions of Law, filed 4-26-56.

128. Judgment and Decree, filed 4-26-56.

129. Excerpt of Proceedings by Court Reporter on 4-21-56, filed 5-1-56.

130. Motion of Defendants Barnett, Owens and Edward R. Ester to Alter or Amend Judgment and Decree, filed 5-7-56.

131. Affidavit of Arthur G. Barnett in Support of Motion of Defendants Barnett, Owens and Ester to Alter or Amend Judgment and Decree, filed 5-7-56.

132. Memorandum in Support of Motion of Defendants Barnett, Owens and Ester to Alter or Amend Judgment, filed 4-7-56.

133. Notice of hearing Motion of Defendants Barnett, Owens and Ester to Alter or Amend Judgment and Decree, filed 5-7-56.

134. Memorandum of Plaintiff in Opposition to Defendant's Motion to Alter or Amend Judgment and Decree, filed 6-1-56.

135. Notice of Appeal by United States, filed 6-25-56.

136. Notice of Appeal of Defendants, Century Investment Corp., and Virgil J. Pague, filed 6-27-56.

137. Cost Bond on Appeal of Defendants Century Investment Corporation and Virgil J. Pague, filed 6-27-56.

138. Notice of Cross-Appeal of Defendants Arthur G. Barnett and Donald F. Owens, filed 6-17-56.

139. Motion of Defendants Arthur G. Barnett and Donald F. Owens to Extend Time for Filing Record on Appeal and Docketing Appeal, filed 7-17-56.

140. Affidavit of Arthur G. Barnett, filed 7-17-56.

141. Notice of Defendants Owens and Barnett of hearing Motion to Extend Time for Filing Record on Appeal and Docketing Appeal, filed 7-17-56.

142. Notice of Cross-Appeal of Defendants Edward R. Ester and the Marital Community Composed of Him and Lorraine M. Ester, filed 7-17-56.

143. Cost Bond on Appeal of Defendants Barnett and Owens, filed 7-17-56.

144. Cost Bond on Appeal of Defendants Ester, filed 7-17-56.

145. Motion of United States to Dismiss Appeal, filed 7-18-56.

146. Notice of United States of hearing Motion to Dismiss Appeal, filed 7-18-56.

147. Affidavit of Defendant Edward R. Ester Opposing Plaintiff's Motion to Dismiss Appeal and Affidavit in Support Thereof, filed 7-20-56.

148. Substitution of Vernon W. Towne in place of Robbins and Robbins as attorney for Defendants Ester, filed 7-20-56.

149. Affidavit of Defendant Arthur G. Barnett Opposing Plaintiff's Motion to Dismiss Appeal and Affidavit in Support Thereof, filed 7-20-56.

150. Amended Notice of Appeal of Defts. Barnett, Owens and Ester, filed July 31, 1956.

151. Designation of Contents of Record on Appeal filed July 31, 1956, by Defts. Barnett, Owens and Ester.

152. Statement of Points on Appeal, Barnett, Owens and Ester, filed July 31, 1956.

Minute entry of June 4, 1956, re hearing on motion of Barnett, Owens and Ester and Court's own motion amending judgment and order denying all pending motions.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to wit, Notice of Appeal, \$5.00; and that said amount

has not been paid to me for the reason that the appeal is being prosecuted by the Government.

I further certify that the costs incurred by cross-appellants are as follows:

Lycette, Diamond & Sylvester for filing Notice of Appeal on behalf of Century Investment Corporation and Virgil J. Pague	\$5.00
Arthur G. Barnett, Cross-Appeal self and Ester	5.00
Arthur G. Barnett, amended Notice of appeal, Defts. Barnett, Owens and Ester, jointly	5.00

and that said amounts have been paid to me by the respective parties through their attorneys.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 31st day of July, 1956.

[Seal]

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith, supplemental to the original record on appeal herein the following papers in the file dealing with the action, to wit:

153. Bond on Appeal, (Barnett and Owens), \$3,000.00, filed 8-21-56.

154. Bond on Appeal, (Ester), \$2,500.00, filed 8-21-56.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 22d day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 15219. United States Court of Appeals for the Ninth Circuit. Century Investment Corporation and Virgil J. Pague, Appellants, vs. United States of America, Appellees. Arthur G. Barnett and Virginia N. Barnett, His Wife; Donald F. Owens and Jean Owens, His Wife; Edward R. Ester and Lorraine M. Ester, His Wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed August 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15219

UNITED STATES OF AMERICA,

Appellant,

vs.

CENTURY INVESTMENT CORPORATION, et
al.,

Appellees.

STATEMENT OF POINTS ON APPEAL OF
CENTURY INVESTMENT CORPORATION
AND VIRGIL J. PAGUE

Century Investment Corporation and Virgil J. Pague will rely upon the following points in this appeal:

1. The Court erred in awarding damages against these Appellees in the absence of any competent proof of damage.
2. The Court erred in ordering an accounting.

LYCETTE, DIAMOND &
SYLVESTER,

By /s/ LYLE L. IVERSEN,
Attorneys for Century Investment Corporation and
Virgil J. Pague.

[Endorsed]: Filed August 9, 1956.

[Title of Court of Appeals and Cause.]

At a Stated Term, to wit: The October Term 1956, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the fourteenth day of August in the year of our Lord one thousand nine hundred and fifty-six.

Present: Honorable William E. Orr, Circuit Judge,
Presiding,

Honorable Thomas McAllister, Circuit
Judge;

Honorable Stanley N. Barnes, Circuit
Judge.

No. 15219

ORDER DISMISSING APPEAL, ETC.

The United States of America has moved this Court to dismiss its appeal. Appellee and cross-appellant Edward R. Ester has filed an affidavit opposing said motion on the ground that said motion is unsupported by a substantial reason for dismissal. We think the determination by the Attorney General of the United States that further prosecution of the appeal is not desirable is sufficient. Affiant Ester also moves dismissal because the motion is not supported by affidavit. We think the affidavit, filed August 9, 1956, may be considered in support of the motion and thus meet the requirements of Rule 17 of the rules of this court.

The Motion to Dismiss Is Granted

Appellees and cross-complainants Barnett, Owens and Ester have moved this court that in the event the motion of the United States of America to dismiss its appeal is granted, that a supersedeas bond be dispensed with or that this court fix the amount of such bond. We think separate supersedeas bonds should be furnished; cross-appellant Ester and wife to furnish bond in the sum of \$2,500.00, and cross-complainants Barnett and his wife and cross-complainant Owens and his wife to jointly furnish a supersedeas bond in the sum of \$3,000.00; said supersedeas bonds to be conditioned as required by law, to be approved by the United States Attorney for the Western District of Washington, and the Judge of said District Court and filed with the Clerk of said District Court.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL BY
JOINT APPELLEES AND CROSS-APPELLANTS
EDWARD R. ESTER, DONALD F. OWENS
AND ARTHUR G. BARNETT

Joint appellees and cross-appellants, Edward R. Ester and Lorraine M. Ester, his wife, Donald F. Owens and Jean Owens, his wife, and Arthur G. Barnett and Virginia N. Barnett, his wife, herewith present the points upon which they claim the District Court erred:

1. In denying defendants' motions to dismiss the complaint on the ground that the plaintiff failed to state a claim upon which relief can be granted.

2. In failing to dismiss the action because of failure to prove a claim upon which judgment could be based.

3. In entering Findings of Fact and Supplementary Findings of Fact which are inconsistent with the Conclusions of Law and Supplementary Conclusions of Law, and which fail to support the judgment based thereon.

4. In refusing to enter a judgment of dismissal as to these defendants based on the Findings of Fact and Supplementary Conclusions of Law.

5. In assessing damages against these defendants, who are fee owners of the land, based on an accounting of rents from property which had theretofore reverted to them.

6. In making a reference to a Master and in assessing a portion of the Special Master's fee against these defendants.

7. That the Findings of the Special Master are clearly erroneous as to these defendants; that the portion of the Special Master's fee assessed against these defendants is excessive and no fee at all was justified against these defendants because of the Master's erroneous work.

8. In assessing against these defendants, who were not parties to the contract, and who are the

fee owners of the underlying real estate, judgment for damages in the same manner as against:

- (a) Parties to the contract;
- (b) The alter ego of parties to the contract; and
- (c) Defendants who never were and are not now owners of all the real estate underlying their buildings.

ARTHUR G. BARNETT, and
ALEC DUFF,

By /s/ ARTHUR G. BARNETT,
Of Attorneys for Arthur G. Barnett and Donald F.
Owens.

/s/ VERNON W. TOWNE,
Atty. for Edward R. Ester.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1956.

No. 15219

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

CENTURY INVESTMENT CORPORATION
and VIRGIL J. PAGUE, *Appellants,*
vs.

UNITED STATES OF AMERICA, *Appellees.*
ARTHUR G. BARNETT and VIRGINIA N. BARNETT,
His Wife; DONALD F. OWENS and JEAN OWENS,
His Wife; EDWARD R. ESTER and LORRAINE M.
ESTER, His Wife, *Appellants,*
vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

Hon. John C. Bowen, *Judge*

**Brief of Century Investment Corporation
and Virgil J. Pague**

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,
*Attorneys for Century Investment Corporation
and Virgil J. Pague*

Office and Post Office Address:
800 Hoge Building,
Seattle 4, Washington.

FILED

DEC 31 1956

PAUL P. O'BRIEN, CLERK

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CENTURY INVESTMENT CORPORATION
and VIRGIL J. PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT.

His Wife; DONALD F. OWENS and JEAN OWENS.

His Wife; EDWARD R. ESTER and LORRAINE M.

ESTER, His Wife,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

Hon. John C. Bowen, Judge

Brief of Century Investment Corporation
and Virgil J. Pague

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,

*Attorneys for Century Investment Corporation
and Virgil J. Pague*

Office and Post Office Address:

800 Hoge Building,

Seattle 4, Washington.

INDEX

	<i>Page</i>
I. Jurisdiction	1
II. Statement of the Case.....	5
III. Questions Involved	11
IV. Assignments of Error.....	12
V. Argument	12
1. The Court Erred in Awarding Damages in the Absence of Competent Proof	12
A. The Contracting Officer Has Not Determined the Amount of Damages	12
B. There Is No Proof of Actual Damage.....	16
2. The Court Erred in Ordering an Accounting.....	18

TABLE OF CASES

Anderson v. Dalton, 40 Wn.(2d) 894, 246 P.(2d) 853.....	16
Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 34 L.Ed. 295.....	24
General Steel Products Co. v. U.S., 36 Fed.Supp. 498.....	14
Nordgren v. Lawrence, 74 Wash. 305, 133 Pac. 436.....	16
United States v. Bernard, 202 Fed. 728.....	18
United States v. Bitterroot Development Co., 200 U.S. 451, 50 L.Ed. 550.....	19
Werner v. U.S., 119 F.Supp. 894.....	32
Wood v. Miller, 147 Wash. 251, 265 Pac. 727.....	16

TEXTS

15 Am. Jur. 400.....	16
1 C.J.S. 646.....	19

STATUTES

42 U.S. Code 1475.....	28
42 U.S. Code 1521.....	5
42 U.S. Code 1543.....	28
42 U.S. Code 1553.....	27
61 Stat. 449.....	27
66 Stat. 31.....	29
66 Stat. 54.....	30
Proclamation 2714	27
Proclamation 2974	29-32
24 Code Fed. Reg. 3405C.....	28

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CENTURY INVESTMENT CORPORATION
and VIRGIL J. PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT,
His Wife; DONALD F. OWENS and JEAN OWENS,
His Wife; EDWARD R. ESTER and LORRAINE M.
ESTER, His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

I.

JURISDICTION

This is an appeal from an action commenced in the United States District Court for the Western District of Washington, Northern Division, on behalf of the United States by the United States District Attorney. The action is based upon a contract to which the United States is a party and according to the Complaint jurisdiction is based upon Title 28, U.S. Code, Section 1345. This is an appeal from the final judgment in that case.

This action was instituted by a Complaint in a civil action in which it was alleged that the Century Invest-

ment Corporation had entered into a contract for the purchase of certain buildings belonging to the Public Housing Administration with the stipulation that they be removed from the site within a certain time. The Complaint alleges that a \$5,000 bond was posted to ensure performance of the contract and that four of the buildings, namely, Nos. 102, 103, 104 and 105 were not removed from the site, and were being rented by the defendants upon the site (Tr. 3). Plaintiff prayed for an order requiring the removal of the buildings and praying for an accounting of the funds collected by the defendants from tenants and for the allowance of damages to the plaintiff for failure of the Century Investment Corporation to complete its removal contract and for other relief.

Defendant Pague answered the Complaint (Tr. 33) denying that he had entered into any contract with the government and alleging that he had acquired from Century Investment Corporation certain of the buildings and was the legal owner thereof and denied that the buildings were temporary and admitted that he had rented certain apartments therein, and otherwise the allegations in the Complaint were denied. By a first affirmative defense defendant Pague alleged that he was the owner of the land upon which building 102 stands and the owner or lessee of the land upon which

103 stands, and that the buildings had been modified to meet all requirements of the building code of the City of Seattle, and further alleging that the buildings were vitally needed for public housing and approval had been obtained from the City of Seattle for them to be located in the future upon the land where they then stood. It was also affirmatively pleaded that any interest of the government in the land where the buildings stood, either had terminated or would terminate shortly and the owners of the land would not hold the government to any obligation to remove the buildings therefrom, and that the government would suffer no damage if the buildings remained upon the sites where they were located, and further pleadings that no good or equitable purpose could be served by requiring the removal of the buildings. By a second affirmative defense defendant Pague alleged that the tenure of the government on the land on which the buildings stood had expired and that the government was wrongfully asserting the right to possession and this defendant prayed that title to buildings 102 and 103 and the land upon which they stood be quieted against the government (Tr. 33).

The answer of Century Investment Corporation (Tr. 36) admits entering into the contract attached to the Complaint and alleged that the time for completion of the removal of the buildings was extended and that it was led by agents of the government to believe that certain buildings might be made to conform to the require-

ments of the building code of the City of Seattle and might be allowed to remain in place as permanent type buildings, and in reliance thereon buildings 102, 103, 104 and 105 were modified without removing them from the site so that they were no longer temporary buildings, and it is further admitted that Virgil J. Pague had purchased from Century Investment Corporation buildings 102 and 103. By affirmative defense Century Investment Corporation set up virtually the same affirmative matter as was affirmatively pleaded by defendant Pague.

After a trial, judgment was entered awarding damages to the government against Virgil J. Pague and Century Investment Corporation jointly and severally, in the sum of \$5,937.13 and awarding damages against Century Investment Corporation and various other defendants, jointly, in the respective sums of \$3,709.31 and \$2,432.59, and all the defendants were required to pay a sum equal to three-fourths of the amounts allowed a special master for an accounting in the case. Defendants Virgil J. Pague and Century Investment Corporation have appealed from the judgment (Tr. 120).

II.

STATEMENT OF THE CASE

According to the Findings of Fact made by the trial court the Century Investment Corporation purchased, pursuant to an advertisement for bids, buildings numbered 101 through 110 in the Duwamish Bend housing area, City of Seattle (Tr. 62). These buildings were located upon land as to which the government had condemned leaseholds in the year 1945 (Tr. 71) in Civil Action No. 1143 in the District Court for the Western District of Washington, Northern Division, under the authority granted by the Lanham Act, public law 849 76 Congress, as amended, 42 U.S.C. 1521 (Tr. 63).

Virgil J. Pague was one of the stockholders and was the President of Century Investment Corporation (Tr. 66) there being two other officers and principal stockholders in the corporation (Tr. 65). The corporation proceeded to sell and remove the buildings from the site except for buildings 102, 103, 104 and 105 (Tr. 68). Building 102, which was located partially upon certain of the lots leased pursuant to the government's condemnation and upon certain street areas, was acquired from the corporation by Virgil J. Pague, and the same is true of building 103 (Tr. 68 and 69). Building 104 was acquired through *mesne* conveyance from Century Investment Corporation by defendants Barnett and Owens (Tr. 69) and building 105 was acquired by defendants Ester (Tr. 70). Each of the defendants ac-

quired the fee title to the land underlying the buildings, or acquired a leasehold from the fee owner (Tr. 68, 69, & 70). By the terms of the declaration of taking under which the government had acquired the leaseholds, the government was “ * * * granted the right to renew said exclusive use without the consent of the owners of said land from year to year, not to exceed three years after the termination of the national emergency as declared by the President of the United States; which national emergency was that declared to exist by presidential proclamation of September 8, 1939” (Tr. 71). The government had continued to file notices of its intention to renew until the period extending to February 21, 1956 (Tr. 71). Defendants had refused consent to renewal (Def. Ex. A3, A4; Tr. 52). Each of the defendants knew of the requirement in the contract of Century Investment Corporation for the removal of the buildings and had made efforts to obtain a modification (Tr. 71). The defendants had secured from the City of Seattle a resolution authorizing the continuance of the buildings on the site and had secured from the Board of Public Works permits for leaving the buildings on the site (Tr. 72 and 73).

The lower court held by its conclusion of law No. VII that the Century Investment Corporation breached its contract by failing to remove buildings 102, 103, 104 and 105 from the site and by purporting to convey them to the defendants without requiring them to be removed

(Tr. 76). By Findings of Fact and Conclusions of Law entered on October 20, 1955, the court found that the defendants should be required to remove the buildings from the sites (Tr. 77 and 78). However, by supplemental Findings of Fact and Conclusions of Law (Tr. 107) dated April 26, 1956, the trial court found that the government had not sustained the burden of proving that it had paid the rent necessary to keep the leasehold alive on the property underlying the buildings (Tr. 108), and the court rescinded the order to require specific removal of the property, but stated (Tr. 109):

“ * * * Instead of compelling specific performance of removal and site clearance require the defendants to pay a fair, reasonable and just compensation by way of damages for their failure to remove and clear the sites of, and for their wrongful commercial use of said buildings and to comply with all of the requirements of the contract of sale.”

By Paragraph XII of the original Conclusions of Law Tr. 80) the court concluded:

“That the plaintiff has been damaged by the wrongful use of said buildings by the defendants from the time of said breaches of contract by defendant Century Investment Corporation in using same for commercial rental purposes to and including the present time and for such future time as said buildings remain on site, and for the wrongful use of the land underlying said buildings and defendants continue to so use said buildings and property, which is for the exclusive use of the plaintiff from said time of said breaches of con-

tract to and including the present time; that the plaintiff is entitled to a complete accounting to be performed under the direction of the court, of all revenues received from and current operating expenses incidental to such commercial uses to determine monetary damages sustained by the plaintiff on account of the alleged breach of contract herein, and that the court should retain jurisdiction of this action for these reasons and should fix a date for the hearing on same."

Pursuant to that conclusion, the court entered an order appointing a special master (Tr. 82) by which it was ordered that an accounting of funds received by each of the defendants from the unauthorized use of buildings 102, 103, 104 and 105 be had. The special master issued a report, transmitted to this court as Item 107 under the certificate of the Clerk of the District Court to Record on Appeal (Tr. 126). By this report it was determined that the net income of defendant Pague from the rental of buildings 102 and 103 amounted to \$5,937.13, and judgment was entered against defendant Pague and Century Investment Corporation for that amount (Tr. 116). Amounts similarly arrived at were entered against other defendants and Century Investment Corporation jointly (Tr. 116). Defendant Virgil J. Pague moved to strike the supplemental report of the special master (Tr. 95) before the same was confirmed. The grounds for that motion are stated as follows (Tr. 95):

"Defendant Virgil J. Pague moves to strike the supplemental report of special master for the

reason that the same is a report of irrelevant facts having no relation to damages due plaintiff or to any issue properly before the court in this case. This motion is also made for the reason that the report of special master has not been made nor filed in conformity with the rules applicable thereto. This motion is made for the reason that the report is made upon a fundamentally wrong basis, having been made wholly without reference to the value of the plaintiff's leasehold or damage thereto, or to any monetary damage suffered by plaintiff by any breach of contract or action of any of the defendants, and further for the reason that the rule of court relative to special masters had not been complied with in the filing of the transcript herein."

By the Findings of Fact, (Tr. 73) it appears that the government lost any right to the street areas occupied by the buildings as of October 28, 1953, and as of December 9, 1953, the defendants had been given those rights (Tr. 73). No cognizance of the defendants' exclusive rights in the street areas was had by the master in determining the profits and no finding was made by either the court nor the master as to the value of the government's leasehold. No evidence was introduced by the government as to any actual damages suffered by it from the breach of contract. By the terms of the contract the government's rights in the event of failure of the purchaser to comply with all the terms of the contract was stated in Paragraph 6 of the general conditions (Tr. 16) as follows:

“In the event the purchaser fails to complete the removal and clean-up operations within such period of time, the government may take possession of any property still on the site, destroy and otherwise dispose of it and may charge the purchaser for the cost of removing the dwellings and cleaning up the site without crediting the purchaser with the salvage value of the material or construction work removed.”

Under paragraph 2 of the General Conditions of the contract (Tr. 13) performance security was provided for as follows:

“Performance Security. The Purchaser shall within five days of the delivery to the Purchaser of an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier’s check or money order payable to the Seattle Housing Authority in the amount required under Section 3 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages *determined by the Contracting Officer* to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security.” (Emphasis supplied)

No evidence was produced that the Contracting Officer ever made any determination of damages.

III.

QUESTIONS INVOLVED

This case involves the following questions :

1. Whether under a contract providing for damages to be determined by a Contracting Officer, the court may award damages in the absence of any such determination by the Contracting Officer. This question is raised by the specific terms of Paragraph 2 of the general conditions of the contract (Tr. 13).

2. Whether in the absence of proof of actual damages the United States may recover the net profits earned by one trespassing upon the government's leasehold. This question is raised by the award of damages against the defendants who are not parties to the contract for removal based upon their use of buildings or land supposedly under government leasehold.

3. Whether a leasehold acquired by condemnation in 1945 renewable for three years after the existing emergency could be continued without the consent of the fee holders of the land until July, 1956, where the government had failed to pay the taxes which were a material portion of the compensation awarded in the condemnation proceedings to the fee holders. This question is raised because the defendants as fee holders of the land had refused to consent to renewal after their acquisition of the property and the court found that the plaintiff had not paid that portion of the condemnation

award consisting of payment of current taxes (Tr. 108).

IV.

ASSIGNMENTS OF ERROR

The lower court erred in the following respects:

1. The court erred in awarding damages against these appellees in the absence of any competent proof of damage.
2. The court erred in ordering an accounting.

V.

ARGUMENT

1. THE COURT ERRED IN AWARDING DAMAGES IN THE ABSENCE OF COMPETENT PROOF

A. The Contracting Officer has not determined the Amount of Damages.

The government's suit against Century Investment Corporation must be based upon the contract since Century Investment Corporation did not itself continue to maintain the buildings on site but Century Investment Corporation had sold them to the other defendants prior to the end of the time for completion under the contract, and the liability, if any, of Century Investment Corporation must be that for breach of contract. The contract in this case spells out the remedies of the government in case of breach of contract, and it is not competent for the courts to make a new contract for the parties or to depart from the provisions of the contract with respect to the ascertainment of damages.

By the General Conditions of the contract, which were a part of it, Paragraphs 2 and 6 set out exactly what can be done in case of failure to perform by the contractor. Paragraph 2 (Tr. 13) reads in its material part as follows:

“The purchaser is liable for any *expense incurred by the government* as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The purchaser shall be liable for the full amount of damages *determined by the Contracting Officer* to have been occasioned by his failure to comply with provisions of this sale whether or not such damages are secured by the performance security.” (Emphasis supplied)

It will be noted that the liability of the purchaser is expressed in the foregoing quotation as being for “any *expense incurred by the government* as a result of his failure to abide by the terms of this sale.” It should be noted further that the parties have contracted as to the person who shall determine the amount of the damages, and have designated the “Contracting Officer.” The term Contracting Officer is defined in the contract in Section 11 (Tr. 18) as follows:

“The term Contracting Officer shall mean the person signing this contract for the government or his duly authorized successor in office and any person authorized to act for him as his duly authorized representative.”

In this case the government introduced no evidence to the effect that the Contracting Officer had ever made any determination of the amount of the damages for which the purchaser should be liable. A determination by the Contracting Officer is, under the terms of the contract, a condition precedent to liability by the purchaser for damages. No evidence was introduced to show that *any expense* was incurred by the government as a result of the failure of the contractor to abide by the terms of the sale. The damages in this case do not purport to be based upon either a *decision by the Contracting Officer* as to the amount of the damages, or upon *expenses incurred by the government*, but are based upon the master's ascertainment of the amount of profit earned by the defendant Pague from renting the property. This is in accordance with the instructions given the master by the order appointing him (Tr. 82).

The damages in this case have been assessed upon a basis wholly different from that contemplated by the parties in their contract. Where the parties contracted that a determination of facts should be made by the Contracting Officer, such a determination is binding on the courts and is reviewable only for mistakes in law. *General Steel Products Company v. U. S.*, 36 Fed. Supp. 498. There was a failure of proof in the government's case when they did not establish that any determination had been made by the Contracting Officer as provided in the contract. Such a determination is a

condition precedent to any review of damages by the court and an award of damages without a determination by the Contracting Officer is an award in disregard of the express terms of the contract.

The remedies of the government are set out in their entirety in Paragraphs 2 and 6 of the general conditions. Paragraph 2 alone deals with damages. Paragraph 6 (Tr. 16) gives the government the extraordinary right to perform the work of removal itself and charge the contractor with it. The pertinent part of Section 6 reads:

“In the event the purchaser fails to complete the removal and clean-up operations within such period of time, the government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the purchaser with the cost of removing the dwellings and cleaning up the site without crediting the purchaser with the salvage value of the material or construction work removed.”

The remedies of the government have thus been spelled out exactly. These were the risks that the purchaser took with respect to the eventuality of a failure to perform. The contractor cannot be charged with a contract obligation for breach of contract greater than those which it assumed. The government did not undertake to use the remedy provided for in Section 6 of the general conditions, nor is there any proof that it invoked the remedy prescribed in Section 2 since no determination of the Contracting Officer was proved and damages have

of the government by leaving the houses on the property, the measure of damages is not the profits which he made therefrom, but rather the value of the use of the property. This court in the case of *U. S. v. Bernard*, 202 Fed. 728, held in a case where one had wrongfully used government range land as follows:

“The measure of damages for an appropriation of land by a continuing trespass is the worth of the use of the property.”

In this case there was no evidence as to the worth of the use of the property. In the same case from which we have just quoted, this court also said vindictive damages would not be allowed for a trespass. The court said on page 731:

“By applying to a court of equity the claimant waives all right to vindictive damages.”

The court added:

“The function of a court of equity goes no further than to award compensatory damages.”

This is an equity proceeding and there is no relation between the damages awarded based upon the profit made by the defendants and compensation for any expense incurred or loss suffered by the government. There is no proof of any loss by the government.

2. THE COURT ERRED IN ORDERING AN ACCOUNTING

In this case the court ordered an accounting and included in the judgment against these defendants $\frac{3}{4}$ of the fee of the master. This is a sizeable item, amounting to \$1,937.25. The accounting was not justified in this

case and the court erred in ordering it. The result of the accounting did not in any way contribute, nor under the order of the court setting up the accounting, could it contribute to any determination of damages.

This is not a case in which there was any fiduciary relationship between the parties and it was not pleaded nor proved that the government had any interest whatsoever in any amounts which might have been collected by the defendants from tenants on the premises. An accounting is not obtainable simply because there are accounts. Defendant Pague in this case was not a party to the contract, and so any damages against him must have been based upon a trespass or unauthorized use of government property. The Supreme Court of the United States in the case of *United States v. Bitterroot Development Company*, 200 U.S. 451, 50 L.Ed. 550, held that in a case of trespass upon government land even where there were damages by the cutting of timber there was no right to an accounting since the trespass is compensable in damages and is subject to a legal remedy. The court pointed out that the measure of damages was the loss to the United States rather than an accounting of the profits made by the defendants. That case is fully applicable here. An accounting is an equitable remedy available only under well-defined circumstances. 1 C.J.S. 646 states the rule as follows:

“ * * * nevertheless a court of equity will not take jurisdiction of every transaction in which there are accounts to be adjusted. So, although it has

been said that matters of account are of equitable cognizance, and the broad statement has been made that such matters of account are *per se* within the scope of equitable jurisdiction, the true rule is that the mere existence of an account will not confer jurisdiction, and that, to warrant the interference of equity, there must be a fiduciary relation, or mutual or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction, such as fraud, unless the circumstances of the fraud are such that adequate relief could be had in a court of law.”

Plaintiff’s rights to recover for breach of contract are those specified in the contract. The buildings in this case were not, under any reasonable interpretation of the contract, the property of the Government after they had been sold, and there was nothing in the contract by which the Government retained any right to an accounting from any profits made from them.

The contract with the Government was not merely a contract for service, but was a *sale*. Paragraph 2 of the document designated “Offer and Acceptance of Offer” (Tr. 19) reads:

“The purchaser offers and agrees to purchase from the seller and to remove the property set forth and described in Attachment A * * * ”

This is language of sale. The Century Investment Corporation was the purchaser of the property. There is nothing in the contract to make the passing of title contingent upon prior removal of the buildings from the site. All of the language used in the contract documents

referred to the transaction as being one of sale. Thus, paragraph 1 of the "Invitation to Bid" which was incorporated by reference into the contract (Tr. 10) reads in part: " * * * The United States of America * * * has offered to sell for offsite removal the property as follows and hereinafter listed on Attachment A." This was clearly an offer to sell the property, and the offsite removal was an incident of the sale, but the transaction was a sale nevertheless. In the same paragraph that we have just quoted from, occurs the following (Tr. 11): "Each sales unit is offered separately, and purchasers may remove from the site in any feasible manner, either intact or as salvage material." This is wholly inconsistent with any contention that title did not pass until after removal. The purchaser, by this contract, was free to do as it pleased with the property after it acquired title. The conditions of the sale clearly implied an immediate passing of title. Thus, under paragraph 5 of the "General Conditions" (Tr. 16) we find the following: "The purchaser shall assume responsibility and be liable from and after the date of delivery to the purchaser of an executed copy of this contract for the care and protection of the property conveyed by this instrument." It is readily apparent from the foregoing quotation that the Government retained no property right in the buildings after the execution of the document of sale. Paragraph 6 of the General Conditions (Tr. 16) provides in part:

“The purchaser shall not commence work until he has made payment in full of the purchase price * * * ” Thus, it will be seen that any work is contingent upon completion of the sale of the property. Since title to the property passed upon execution of the contract, the Government is in no position to claim an accounting for profits from the buildings since the Government was not the owner of the buildings and would have no interest in any rentals or income derived therefrom.

The Government remedies are contained in the contract itself. Paragraph 6 of the General Conditions (Tr. 16) provides: “In the event the purchaser fails to complete the removal and cleanup operations within such period of time, the Government may take possession of any property still on the site, destroy or otherwise dispose of it and may charge the purchaser with the costs of removing the dwellings and cleaning up the site without crediting the purchaser with the salvage material or construction work removed.” The Government did not invoke that remedy, and at this time could not do so without trespassing upon private property in which it has no interest or estate. No expenses have been incurred by the Government under the section just quoted and, of course, there is no occasion for any accounting by reason of that section. The Government has no interest in the income from the property and there is no occasion for an accounting.

It was error for the court to order an accounting and consequently that portion of the judgment assess-

ing costs of accounting against these defendants should be set aside.

This is not an action for compensation for the use of government property since such a prayer is not within the pleadings in the case and in any event there was no government property used. We have already discussed the fact that by the terms of the sale, title to the buildings themselves passed from the government, and we should like further to point out that during the time that these buildings remained on the land subsequent to the original removal date, the government was actually without tenure on the land. It is clear that the government had no tenure to the street areas after October 28, 1953, and the court has so found in paragraph 15 of the Findings (Tr. 73) and such tenure was actually in the defendants after December 9, 1953 (Tr. 73). With respect to the ground occupied by the buildings other than the street areas, the defendant Pague was the owner of the land or had the right to possession of the land upon which buildings 102 and 103 stood and other defendants were likewise the fee owners of the land upon which buildings 104 and 105 stood. The court has held that the government failed to meet the burden of the proof with respect to the payment of the compensation prescribed in the condemnation proceeding in paragraph II of the Supplemental Findings of Fact (Tr. 108), and paragraph I of the Supplemental Conclusions of Law (Tr. 111). There is no evidence that the defendants had consented to any renewal of the

leasehold after their title to the land was acquired and the failure of the government to make or tender the payments of the designated consideration for the leasehold served as a condition subsequent to terminate leaseholds. In the case of *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641, 34 L.Ed. 295, the United States Supreme Court expressly stated that where the condemnor does not pay the compensation within a reasonable time it becomes a trespasser. The court said on page 660:

“But clearly the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution the property, although entered upon pending the appeal, is not taken until the compensation is ascertained in some legal mode, and being paid, passes to the owner. Such was the decision in *Kennedy v. Indianapolis*, 103 U.S. 599, where the court construed a clause in the Constitution of Indiana declaring that no man’s property shall be taken or applied to public use, * * * ‘without just compensation being made therefor’ substantially the provision found in the National Constitution. * * * The defendant must pay off the judgment before it can acquire title to the property entered upon, *and failing to pay it within a reasonable time after the compensation is finally determined, it becomes a trespasser and liable to be proceeded against as such.*” (Emphasis supplied)

The government actually had no tenure to the land underlying these buildings because it had not paid the compensation and its leasehold had expired and the defendants, as owners of the fee title, had a right of pos-

session superior to that of the government, and the buildings, as fixtures, were theirs as a part of the real estate.

However, even if the government had not lost its title by reason of the failure to pay the compensation, the leasehold had further expired under the terms of the condemnation proceeding because of the fact that more than three years had expired since the termination of the emergency under which the condemnation proceeding was had.

Defendants are the owners of the land upon which the buildings in question stand. As such, they are also the owners of fixtures, including buildings that remained thereon when the Government's tenancy expired. The Government's tenancy was not effective when these buildings remained on the site after the removal date, and even if the buildings had not been sold to defendants, they would be the owners thereof by reason of their ownership of the land. Plaintiff's estate in the land upon which the buildings stand is dependent upon a condemnation proceedings. That proceeding resulted in a declaration of taking dated June 16, 1945, under which the Government got the following estate (Pl. Ex. 20) :

“The estate taken for said public use is the exclusive use of the lands described in said Schedule A for a period of one year with the right to renew from year to year for the duration of the existing national emergency and three years thereafter, to-

gether with the right to remove at the termination of such use, all improvements constructed or placed thereon by or for the United States, except as set out in Schedule A."

The decree was modified by order entitled "Judgment Fixing Compensation and Directing Funds to Be Paid" (Def. Ex. A2) entered with respect to each parcel involved in this action. The pertinent language of each of the orders is identical. An example will be found in the order entered September 28, 1945, with reference to parcels 1, 2, 4, 8, 10, 12, 13, 14, 16, 18 and 19 owned by King County. Paragraph 3 of that order reads:

"That the United States of America may exercise its right to renew the estate taken in said lands from year to year as provided in the declaration of taking without notice to said respondent, provided that no such renewal shall, without the consent of said respondent, *extend beyond three years after the termination of the existing national emergency.*" (Emphasis supplied)

Thus it will be seen that the tenure of the Government was only for the duration of the national emergency and three years thereafter. Extensions to carry more than three years beyond the end of the emergency could be had only with the consent of land owners.

It is to be noted that the decree is in terms of the *existing* national emergency. Consequently, a subsequently declared national emergency such as the Korean War emergency did not serve to extend the tenure. In the condemnation proceeding, compensation for the

tenure acquired by the Government was set in view of the situation then confronting the parties, namely, the existence of a war with Japan and Germany and the existence of national emergencies declared by proclamation of the President on September 8, 1939, and on May 27, 1941. The Government's tenure was limited to three years following the termination of that existing national emergency. Thereafter, on December 31, 1946, the President issued Proclamation No. 2714 reading as follows:

“Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II effective 12:00 o'clock Noon, December 31, 1946.”

Thus ended the hostilities which were a part of the existing emergency at the time of the condemnation. On July 25, 1947, Congress passed a joint resolution 61 Stat. 449, which provided in Sec. 3:

“In the interpretation of the following statutory provisions the date when the joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941.”

The resolution then lists a number of sections of federal statutes including several from the Federal Public Housing Act. One of these statutes was Sec. 1553 of Title 42, U.S.C.A., calling for the removal of Public Housing Administration temporary buildings upon the

termination of the emergency. Regulations of the Federal Public Housing Administration, as published in 24 Code of Federal Regulations, 3405C, recite that under this resolution the emergency ended July 25, 1947, for purposes of requiring the removal of housing under that section. The resolution also listed Sec. 1475 of Title 42 U.S.C. relating to the use of certain governmental facilities under the public housing program. The resolution also referred to Par. C of Sec. 1543 of Title 42, U.S.C., relating to the handling of fiscal matters under the Federal Public Housing Administration. Surely here was a congressional declaration of the termination of the emergencies. Certainly, after the adoption of this resolution the emergency was not the same one that existed when the order of taking was entered. Now the emergency had been modified by the cessation of hostilities and by an actual declaration that the emergencies declared by the President have ceased for certain purposes including purposes connected with federal public housing.

On the 8th day of September, 1951, the state of war between the United States and Japan was terminated by the signing of a treaty of peace with that country. By House Joint Resolution 289, approved by the President on October 19, 1951, the state of war with Germany was terminated. Now the legal state of war was terminated. Here again the emergency became different from the one under which the property involved in this case

was taken for public use. On April 29, 1952, by Proclamation No. 2974, 66 Stat. 31, the President declared:

“Now, therefore, I, Harry S. Truman, President of the United States of America, do proclaim that the national emergencies declared to exist by the Proclamation of September 8, 1939, and May 27, 1941, are terminated this day upon the entry into force of the treaty of peace with Japan. * * * ”

The Proclamation concluded as follows:

“ * * * and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act approved April 14, 1952, for the purpose of continuing the use of property held under the act of October 14, 1940, Chap. 862, 54 Sta. 1125, as amended.”

Here again the emergencies are terminated for all purposes, including, we submit, the purpose of terminating leaseholds for the duration of the war and three years thereafter.

By the resolution of April 29, 1952, the last vestige of the emergency under which the declaration of taking occurred was gone.

At this point, we believe it is well to call attention to the distinction between the extension of powers on the part of government agencies so that they may continue to exercise their functions and the extension of a lease or tenure acquired from an individual citizen. In considering a leasehold condemned by eminent domain proceedings, we are dealing with an involuntary con-

tract forced upon the citizen by the Government. The Government cannot, any more than an individual, by unilateral action change the conditions of such a contract. When the order of the court specified that the estate taken was a leasehold for the duration of the existing emergency subject to renewal for three years thereafter, it reserved no right in the Government to extend or change the emergency or to alter the conditions under which the compensation for the taking had been fixed without a new condemnation.

Congress could, with full propriety, enact legislation to extend the right of certain officials to function or the effectiveness of certain laws which had originally been subject to termination upon the end of the emergency. *Congress could not, constitutionally, pass an act that would take the property of its citizens by extending the tenure beyond that which was fixed by the court.* Such an act would be taking property *without due process of law*. Congress did not undertake to do any such thing. By public law 313 of the 82nd Congress, 66 Stat. 54, enacted April 14, 1952, known as the Emergency Powers Interim Continuation Act, Congress declared as follows:

“Whereas, the existing state of war with Japan is the last described state of war to which the United States is a party, and the termination thereof and the national emergencies proclaimed in 1939 and 1940 would render certain statutory provisions inoperative; and,

“Whereas, some of these statutory provisions are needed to ensure the national security and the capacity of the United States to support the United Nations in its efforts to maintain world peace; and,

“Whereas, in view of the impending termination of this state of war, it is desirable to extend these needed statutory provisions immediately to June 1, 1952, to permit further consideration of a more extended continuation; now therefore, be it resolved. * * *

“That notwithstanding the termination hereafter of the war with Japan * * * and the emergencies proclaimed by the President on September 8, 1939, and May 27, 1941. * * *

“(a) Except insofar as they otherwise have further effectiveness, the following statutory provisions and the authorizations conferred and the liabilities imposed thereby shall remain in full force and effect to and including June 1, 1952.
* * * ”

The Act then listed a number of statutes including certain sections of the Federal Public Housing Act. It will be noted that this Interim Continuation Act merely keeps in effect certain statutes. It does not undertake to keep in effect contracts with individuals or tenancies acquired from individuals which were subject to determination upon the end of the emergencies. The finality of the proclamation of the President, dated April 29, 1952, terminating the emergencies, was not restricted by its last clause relative to the Emergency Powers Interim Continuation Act, insofar as this case is concerned. The Emergency Powers Interim Continuation

Act merely continued in force certain statutes. It did not continue in force any tenancies or contracts. The President's proclamation No. 2974 was definitely the end of the existing emergencies that were effective when the declaration of taking in this case occurred, and there was no reservation that detracted from that effectiveness.

We believe that the emergency actually ended with the declaration of Congress of July 25, 1947. It may be argued by government counsel that an emergency declared by the President cannot be terminated by Congress. If we concede this to be true, then the very latest date upon which the emergency ended was the date of the Presidential declaration of April 29, 1952. A case closely in point is *Werner v. U. S.* (S.D. Cal.) 119 F.Supp. 894, which involved a lease which was subject to renewal for the duration of the emergency and six months thereafter. The court there held that such a tenancy was definitely ended six months after the declaration of the President of April 29, 1952.

The lower court allowed damages based upon earnings up to November 16, 1955. By no theory could the government have held tenure to the land up to that date. Even if the accounting was relevant as to damages, it was grossly erroneous in ignoring the infirmities of the Government title. Title to the buildings and to the land was merged in the present owners who are the defendants in this case. The Government was without any au-

thority over the lands and had no right to an accounting for their use. Under no valid theory could the government be entitled to an accounting for profits from land or buildings it did not own or have a right to. The government wholly failed to establish any damages suffered by it in this case, and there was no right to an accounting for profits in this case. The government's rights were set out in the contract and there was a total failure of proof with respect to damages. It was error for the court to allow the accounting, or to enter an order awarding damages based upon the accounting since the result of the accounting was in no way related to the value of the government's leasehold and actually the government had no leasehold, and the lower court was in error in awarding any damages at all in view of the government's failure to prove such damages.

Respectfully submitted,

LYCETTE, DIAMOND & SYLVESTER

and

LYLE L. IVERSEN

*Attorneys for Century Investment
Corporation and Virgil J. Pague*

No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Brief of Joint Appellants Barnett, Owens and Ester
Appeals from the United States District Court for the
Western District of Washington,
Northern Division.**

VERNON W. TOWNE,
ARTHUR G. BARNETT,
ALEC DUFF,

*Attorneys for Barnett,
Owens and Ester*

1304 Northern Life Tower
Seattle 1, Wash.

FILE

JAN - 2 1957

No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellée.

**Brief of Joint Appellants Barnett, Owens and Ester
Appeals from the United States District Court for the
Western District of Washington,
Northern Division.**

VERNON W. TOWNE,
ARTHUR G. BARNETT,
ALEC DUFF,

*Attorneys for Barnett,
Owens and Ester*
1304 Northern Life Tower
Seattle 1, Wash.

INDEX

Page

JURISDICTIONAL STATEMENT	1
--------------------------------	---

ARGUMENT

Specification of Error No. 1	9
Inconsistency of Findings and Conclusions	11
Not parties to contract	18
Reverter to appellants	20
Specification of Error No. 2	29
Motions to dismiss	29
Specification of Error No. 3	39
Special Master's report clearly erroneous	39
Jurisdictional Statement	1
Specification of Errors	4
Statement of the Case	2
Summary of Argument	6

TEXTBOOKS

12 Am. Jur. 504, § 6.....	20
12 Am. Jur. 514, § 17.....	19
12 Am. Jur. 812, § 265.....	19
18 Am. Jur. 747, § 124.....	21
30 C.J.S. 217, § 458.....	28
30 C.J.S. 219, § 460.....	28
3 Nichols, Eminent Domain (3rd Ed.) § 9.36(5), and (6)	21

STATUTES

Fifth Amendment to the Constitution.....	18
Revised Statutes, § 3737, 41 U.S.C. § 15.....	31
28 U.S.C. § 1291.....	2
28 U.S.C. § 1345.....	2

RULES

Rule 53(e)(1) Federal Rules of Civil Procedure.....	45
---	----

TABLE OF CASES

<i>Barnes v. Williams</i> , 11 Wheat. 415.....	9
<i>Feldman v. Chicago</i> , 363 Ill. 247, 2 N.E. 2nd 102, 105.....	22
<i>Hyde v. Booraem</i> , 16 Peters 169, 176.....	10
<i>Kutter v. Smith</i> , 69 U.S. 491, 17 L.Ed. 830.....	25, 26
<i>Missouri Pac. Ry Co. v. Bradbury</i> , 106 Mo. App. 450, 79 S.W. 966.....	24
<i>Re Wind</i> , 27 Wn. 2d 421, 178 P. 2d 731.....	10
<i>Societa Italiana Di Mutua Beneficienza v. Burr</i> , 71 F. 2d 496	27
<i>Sun Life Mutual Ins. Co. v. Ocean Ins. Co.</i> , 107 U.S. 485, 27 L.Ed. 337	9
<i>The Annie Lindsley</i> , 104 U.S. 185, 188.....	9
<i>Thomison v. Hillcrest Athletic Assn.</i> (Del. 1939), 5 Atl 2d 236.....	22
<i>Toellner v. McGinnis</i> , 55 Wash. 430, 435, 104 Pac 641.....	24
<i>United States v. Crown Zellerbach Corp.</i> , 60 F. Supp. 853, 860.....	22
<i>U. S. v. Gypsum Co.</i> , 333 U.S. 364, 395.....	10
<i>U. S. v. King</i> , 7 Howard 833, 847.....	11
<i>U. S. v. Lee</i> , 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171	21
<i>Ward v. Cochran</i> , 150 U.S. 608, 27 L.Ed. 1198, 14 S.Ct. 233.....	11

No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Brief of Joint Appellants Barnett, Owens and Ester
Appeals from the United States District Court for the
Western District of Washington,
Northern Division.**

JURISDICTIONAL STATEMENT

This is a joint appeal by defendants Arthur G. Barnett, and Donald F. Owens, and respective marital communities, and Edward R. Ester and marital community from a judgment (R. 114) of the District Court of the Western District

of Washington, Northern Division, entered April 26, 1956. They are referred to herein as Barnett, Owens and Ester. These joint appellants must not be confused with two other appellants who were parties to the contract sued upon, to-wit: VIRGIL J. PAGUE and the CENTURY INVESTMENT CORPORATION. The case was based on a complaint (R.3) of the United States alleging jurisdiction under Title 28, U.S. C. Sec. 1345. Jurisdiction of this court is conferred by Title 28, U.S.C. Sec. 1291. The pleadings showing said jurisdiction appear in the record at R.120-125 inclusive.

STATEMENT OF THE CASE

Joint appellants, Ester, Barnett and Owens, appeal from a joint and several judgment against Ester and Century Investment Corporation in the sum of \$2,432.59 (R.116c), plus an additional joint and several judgment in the sum of \$1,937.25 against Ester, Century Investment Corporation, Barnett and Owens, and Virgil J. Pague for the Special Master's fee in the sum of \$1,937.25 (R.116, item 2); and from a joint and several judgment against Barnett and Owens and Century Investment Corporation in the sum of \$3,709.31 (R.116b), plus the joint and several liability for the Special Master's fee referred to above in the sum of \$1,937.25. The judgments were for damages allowed for the violation of a contract for the sale and off-site removal of certain war housing buildings (R.62-63, 115; plaintiff's Exs. 3, 4, 5, 6, 7; R.4-6, 10, 22).

Barnett, Owens and Ester contend that Supplemental Findings of Fact I and II (R.107-108) and Supplemental Conclusion of Law I (R.111-112) fail to support the judgment based thereon; and that the action must be dismissed as to them. They contend that, as fee owners of their respective lands, they cannot be ordered to account for rents from properties which had reverted to them by operation of law because of the default of the plaintiff in paying just compensation for a condemned estate from year to year. Finally, they contend that they cannot be liable under a contract to which they are not parties. And, if these propositions be true, they contend that a reference to a Special Master as to them was erroneous, and that, in any event, the Special Master's Report is clearly erroneous, his work poor, and his fee exorbitant.

It is further contended that the court committed error in denying motions to dismiss for failure of the complaint to state a claim and, after trial, for failure to prove a claim upon which judgment could be founded. This has made it necessary to summarize the plaintiff's complaint and the answers of Barnett, Owens and Ester in the portion of this brief devoted to argument on specification of error No. 2. The pleadings will be helpful in obtaining further understanding of the case, in addition to showing the issues not met by the court in its findings of fact and conclusions of law.

SPECIFICATION OF ERRORS

The specification of errors by Barnett, Owens and Ester follow the statement of points (R.144), and are grouped as follows:

1. Supplemental Findings of Fact I and II (R.107-108) and Supplemental Conclusion of Law (R.111) fail to support the judgment, and instead, support a judgment of dismissal as to these joint appellants. Consequently, Supplemental Findings of Fact III, V, VI, VII and VIII (R.108-111) and Supplemental Conclusions of Law II, IV, V and VI (R.112-113), are clearly inconsistent and erroneous:

Barnett, Owens and Ester, being the owners of the land underlying the buildings (R.68, Par. XI, introductory finding; R.69c; R.70d; R.107 introductory paragraph), and not being parties to the contract sued upon, and there being no other findings justifying the assessment of damages against them, there is no basis in law or fact on which to sustain the judgment as to them. For the same reason, no damages can be assessed against Barnett, Owens and Ester, because, as fee owners, they are not required to make an accounting of rents from properties which had reverted to them by operation of law as the result of the default of the plaintiff in failing to pay decreed just compensation. The judgment rendered should be against the parties to the contract, to-wit, A. E. Sherman, (R.64 par III) and his alter ego, Virgil J. Pague, (R.64 par. IV) appellant herein, and the Century

SPECIFICATION OF ERRORS (Cont.)

Investment Corporation, appellant herein, as assignee of the contract (R.65 par. V) from Sherman and Pague.

2. The denial by the court (R.48) of the motions of Barnett, Owens and Ester to dismiss them before trial on the ground that the plaintiff's complaint failed *to state* a claim (R.22-23), and the denial of the motion (R.119) to dismiss them after trial for the plaintiff's failure *to prove* a claim on which judgment could be based (R.118, item II).

3. Error is claimed to the ruling of the court (R.115) confirming and adopting the Special Master's reports (R.84; 85-91). Joint appellants, Barnett, Owens and Ester, objected (R.97-105 incl.) on the grounds that the Special Master:

- (a) Discriminated against Barnett, Owens and Ester in failing to apply the same accounting methods to them as he did to the other appellants on exactly the same kinds of buildings, repair items, etc., and compelling Barnett, Owens and Ester to capitalize over many years identical items allowed to other appellants as an expense deduction in the year incurred;
- (b) Did not apply the proper depreciation schedules;
- (c) Committed clear error and was inconsistent in his own work;
- (d) Was allowed an exorbitant fee for the amount of time and money involved, being in excess of the compensation of a Federal judge; did poor and substandard work.

SUMMARY OF ARGUMENT

1. Supplemental Findings of Fact I and II (R.107-108) state that it was incumbent upon plaintiff to prove its exclusive right of possession to the land involved at all times material to the action, and that the *plaintiff had not sustained that burden and had not proved payment of just compensation* and that the plaintiff was therefore not entitled to an order specifically compelling removal of the buildings. These Supplemental Findings support the Supplemental Conclusion of Law I (R.111-112) that the plaintiff failed to prove its exclusive right of possession to the lands involved at all times material to this action and was not therefore entitled to an order compelling the owners of the land to remove the buildings and clear the sites. On these supplemental findings and this supplemental conclusion of law, the judgment should have been one of dismissal of the landowners, joint appellants, Barnett, Owens and Ester.

2. The court committed clear error as to Barnett, Owens and Ester in entering additional supplemental findings of fact III, V, VI, VII, VIII (R.108-110) and supplemental conclusions of law II, IV, V and VI (R.112-113) in the following respects:

- (a) Error in law because Barnett, Owens and Ester, being the owners (introductory findings in R.107 and in R.68, par XI and XIc,d) were the only ones entitled to exclusive possession against all the

SUMMARY OF ARGUMENT (Cont.)

world, including the plaintiff (R.107-108). This being so, their use of their own property and all improvements thereon could not be attacked by the plaintiff or any other person not proving a right to possession.

- (b) The Supplemental Findings I and II (R.107-108) and Supplemental Conclusion of Law I (R.111) are inconsistent with the remainder of the supplemental findings and the supplemental conclusions because it is inconsistent to state that plaintiff is not entitled to exclusive possession of the land for failure to pay just compensation as decreed in condemnation, and that Barnett, Owens and Ester are the owners (R.68 XI introduction, c, and d; R.107 introduction) and then to make the owners account to non-owners without a finding that they were liable on some other theory; in fact, Supplemental Findings of Fact III, V, VI and VIII (R.108-110) and Supplemental Conclusions of Law II, IV, V and VI (R.112-113) become thus clearly erroneous as to Barnett, Owens and Ester although consistent and correct as to the parties to the contract. If the plaintiff was not entitled to exclusive possession of the land, how then can the plaintiff be damaged for the owner's use thereof

SUMMARY OF ARGUMENT

in the absence of some other theory of law giving a right for damages? The court has committed error in failing to distinguish between the landowners, joint appellants Barnett, Owens and Ester, and the original parties to the contract, to-wit, A. E. Sherman (R.64, findings III) who was the alter ego for Virgil J. Pague (R.64-65, findings IV and V), both of whom participated in an assignment, made in the office of plaintiff's agent, to the Century Investment Corporation (R.65) on July 3, 1953. Not until five months later or in November of 1953 does appellant Ester purchase Building 105 (R.70d); nor until January 20, 1954 do appellants Barnett and Owens purchase Building 104 (R.69c). It is clear they were, and are, not parties to the contract.

3. If the argument so far be correct, then no accounting is due from Barnett, Owens and Ester, and no judgment for damages or portion of the Special Master's fee can be assessed against them. It is due from the parties to the contract—A. E. Sherman and his alter ego Virgil J. Pague, and Century Investment Corporation, their assignee. But, in any event, the Special Master's report is objected to as being clearly erroneous, inadequately done, and his fee exorbitant for the time spent, the amount involved, and because it is in excess of the compensation of a federal judge.

ARGUMENT

Specification of Error No. 1.

The supplementary findings and conclusions do not support a judgment against Barnett, Owens and Ester, but support a dismissal; and are inconsistent and clearly erroneous.

In *Sun Mutual Life Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 27 L.Ed. 337, the court, reversing the decree, held that a conclusion, stated as one of law, must be upheld by express finding of fact, and quoted from *The Annie Lindsley*, 104 U.S. 185, 188:

“The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree.’ The findings of fact being in the nature of a special verdict, we cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference . . .”

The court, at page 501, also quoted from Chief Justice Marshall in the case of *Barnes v. Williams*, 11 Wheat. 415:

“Although there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff”;

ARGUMENT (Cont.)

and, at page 508, the court said other findings negative the conclusions of law.

“Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agency, or by a jury, this court may reverse findings of fact by a trial court where ‘clearly erroneous.’” *U.S. v. Gypsum Co.*, (1947) 333 U.S. 364, at 395.

A finding that a will was delivered by a testator to his wife with directions to destroy it, and that she destroyed it by burning in the family apartment and in the testator’s lifetime, is insufficient to support a judgment that the will was legally revoked, where it fails to show compliance with the statutory requirements that a destruction of a will, to be effective as a revocation, must have been in the testator’s presence as well as with his consent. *Re Wind*, 27 Wn. 2d 421, 178 P. 2d, 731, 173 A.L.R. 1276.

In *Hyde v. Booraem* (1842) 16 Peters 169, at 176, Justice Story said:

“We can only re-examine the law, so far as he has not pronounced upon it, upon a statement of facts, and not merely a statement of the evidence of facts, found in the record in the nature of a special verdict on an agreed case.

“ . . . the question . . . is, whether, in point of law,

ARGUMENT (Cont.)

upon these facts, the judgment can be maintained. We are of the opinion it cannot be . . . ”

The judgment was reversed with the direction to dismiss.

In *U. S. v. King* (1849) 7 Howard 833, at 847, the court said that although no statement of facts was filed until after the appeal:

“ . . . The facts upon which the question of title arises are as fully before us as if they had been set forth in the form of a case stated . . .

“ . . . the question in the Superior Court necessarily is whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record . . . ”

The court then went on to hold that the judgment was erroneous on two grounds and must be reversed, at page 854.

In *Ward v. Cochran* (1893) 150 U.S. 608, 27 L.Ed. 1198, 14 S.Ct. 233, a new trial was granted on the ground that the verdict was insufficient to sustain the defendant's title by adverse possession in failing to find that such possession was actual and exclusive.

Inconsistency of Findings and Conclusions

The Findings of Fact and Conclusions of Law dated October 20, 1955 (R.62) were amended by Supplemental Findings of Fact and Conclusions of Law entered on April 26, 1956 (R.107), wherein the court reaffirmed the findings

ARGUMENT (Cont.)

and conclusions entered on October 20, 1955 "in their entirety except that they are modified only as to the specific details enumerated here." (R.110, par VII). Summarized, the supplemental findings of fact are:

I (R.107-108)

That it was incumbent upon the plaintiff to prove its exclusive right of possession of the land upon which the buildings have, at all times material to this action, been and are now located.

II (R.108)

That the plaintiff has not fully sustained its burden, in that, although the judgment on the declaration of taking and the judgment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the Court cannot find that such installments have been paid and accordingly the Court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said building and clear the site upon which they stand. This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate.

III (R.108-109)

That the present and only estate in the land claimed by

ARGUMENT (Cont.)

the plaintiff expires on July 1st, 1956 and plaintiff has no further intention of renewing or extending said estate. That the defendants, so far as existing judgments and the orders of the court are concerned, will be entitled to the exclusive possession of said real estate and it would be more burdensome to them, than advantageous to the plaintiff, to require the defendants to specifically perform this court's previous contemplated order of building removal and site clearance. That from practical and compensatory standpoints the Court now finds that it is more just, considering the material equities and the law to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all the requirements of the contract of sale.

V (R.109-110)

As to joint appellants Barnett and Owens, a fair, reasonable and just award of damages to be awarded to the plaintiff against said Barnett and Owens and defendant Century Investment Corporation, jointly and severally, is the sum of \$3,709.31.

VI (R.110)

That as to defendant Ester, a fair, reasonable and just

ARGUMENT (Cont.)

award of damages to be awarded to the plaintiff against Ester and the marital community and the defendant Century Investment Corporation, jointly and severally, is the sum of \$2,432.59.

VIII (R.110-111)

That a reasonable fee for services rendered by the Special Master is the sum of \$2,500.00, together with the sum of \$83.00 for a court reporter, three-fourths of which are to be paid by all of the defendants, and each of them, their obligation to be joint and several, one-fourth to be paid by the plaintiff.

The court also finds that, although the Master found the defendant Century Investment Corporation did not directly receive the profits of commercial use of the buildings, it nevertheless is liable for all damages and for three-fourths of the sums stated in paragraph VIII.

Summarized, the Court's Supplemental Conclusions of Law are:

I (R.111)

That it was incumbent upon the plaintiff to prove its right of possession of the land upon which the buildings, furniture, furnishings, equipment and appurtenances herein involved have, at all times material to this action, been and are now located and that the plaintiff did not fully sustain that

burden and it therefore is not entitled to an order of this Court compelling the present owners of the land involved herein to remove the buildings and clear the sites upon which they stand.

II (R.112)

That the plaintiff is entitled to be compensated by the defendants by way of damages for their failure to remove and clear the sites, for the wrongful commercial use of said buildings and to comply with the removal requirements of the contract of sale entered herein on July 14, 1953.

The remaining conclusions (R.112-113) repeat the award of damages and direct payment of the Master's fee as in the findings.

The court in commencing its supplemental findings of fact and conclusions of law (R.107) stated:

“ . . . and the said defendants, being the owners of the real estate involved in this action and identified in Paragraph XI of the Findings of Fact and Conclusions of Law entered by the Court on October 20, 1955 . . . ” reiterated its previous findings that, as to the lands underlying Building 104, Barnett and Owens were the owners, and, as to the lands underlying Building 105, Ester was the owner. (R.68, par. XI.)

The foregoing indicates that the Supplemental Findings of Fact I. and II (R.107-108) and Conclusion of Law I. (R.111) fail to support the judgment, and that they are in-

consistent with the other supplemental findings and conclusions. They are also inconsistent with the original findings and conclusions as appears from the following summary:

Findings of Fact III, IV and V (R.64-65) conclusively show that A. E. Sherman was the alter ego of Virgil J. Pague. Consequently, for all damages which may be due plaintiff, Century Investment Corporation, A. E. Sherman and his alter ego, Virgil J. Pague, are solely liable as parties to the contract. As a matter of fact, since it clearly appears by paragraph VI of the findings (R.66) that there was no such "person" as the Century Investment Corporation at the time the assignment was made to it by A. E. Sherman, this would mean that the original party liable on the contract was Virgil J. Pague, as the principal of A. E. Sherman.

Conclusion of Law No. IV (R.74) is that the contract of July 14, 1953 was valid and in compliance with the Lanham Act. The contract, however, is not valid against the land-owners, Barnett, Owens and Ester. Neither the plaintiff nor any contracting party with plaintiff to remove the buildings has the right to go upon said property. By the plaintiff's failure to prove payment of just compensation it leaves the owner complete sovereign of his property and everything situate thereupon. It is submitted then that the contract from the beginning was never applicable to Barnett, Owens and Ester under Supplemental Findings I and II (R.107-108 and Supplemental Conclusion I (R.111).

Paragraph X (R.77) of the Conclusions of Law is that

Barnett, Owens and Ester acquired no better title than Century Investment Corporation had and were not innocent purchasers without knowledge and notice of the contract's express requirements that the buildings be removed from the site. As owners of the land, Barnett, Owens and Ester had better title than anybody else in the world. The plaintiff had nothing. Century Investment Corporation had no better title or right to go upon the land of Barnett, Owens and Ester than plaintiff did and the plaintiff as detailed above had no right of possession according to the Supplemental Findings I and II (R.107) and Supplemental Conclusions I. (R.111).

Since by the Supplemental Findings (R.107) and Conclusions (R.111), plaintiff failed to sustain the burden of proof regarding its right to exclusive possession, and since it has been expressly found plaintiff has failed to pay just compensation, the owner then is the one with exclusive possession; then neither the party-plaintiff nor the Century Investment Corporation could come on the property without the consent of the owner to whom the fee reverted by the plaintiff's own default over many years.

Finding of Fact XII (R.70) is that Barnett, Owens and Ester acquired their respective interest after the date of the contract; the balance of the Finding is almost completely amended by the Supplemental Findings I and II (R.107-108). Barnett, Owens and Ester, the former on January 20, 1954 (R.69c) and the latter in November, 1953

(R.70d) took immediate possession thereof and immediately started to codify the same and held the same adverse to all the world including plaintiff (R.73).

Not Parties to Contract

Not being parties to the contract sued upon by the appellee, the joint appellants, Barnett, Owens and Ester, contend that it is an unjust and unconstitutional taking of property in violation of the Fifth Amendment to the Constitution of the United States to hold them liable for damages by way of an accounting of rents derived from property which by operation of law had reverted to them as fee owners.

The failure of the court to hold that the only parties liable for damages are the parties in privity to the appellee by way of contract and that these are the other joint appellants herein, to-wit: Century Investment Corporation and Virgil J. Pague, is error (R.144, Item 8). Century Investment Corporation signed and accepted an assignment of the contract (R.65,20) made out in the office of the agent of appellee; Virgil J. Pague was found by the court to be the real party in interest acting through his alter ego, A. E. Sherman, (R.64-65, par. III, IV and V) who signed the contract. The court also found that Pague negotiated the contract and later promoted the Century Investment Corporation, becoming its president and signing the performance bond (Plaintiff's Ex. 7).

Because Barnett, Owens and Ester are not parties to the contract, and because the land reverted to them as fee owners for failure to pay just compensation, together with all improvements thereon, it was error (R.144, items 6 and 7) to make a reference to a Master (R.82) for an accounting of rents and profits received by them from the lands and improvements; and it was further error to assess a portion of the Master's fee or costs against them (R.116 2.) for the fee and costs are chargeable wholly against the parties to the contract.

“The obligation of contracts is in general limited to the parties making them. Only those who are parties are liable for a breach of a contract. Parties to a contract cannot impose any liability upon a stranger to the contract under its terms. In the case of a written contract, ordinarily only those who are named in the contract are bound thereby. A person who is not named in, or bound by, the terms of a written contract cannot be rendered liable on it by a mere intention that he should be bound, although he was known to, and was in direct communication with, the obligee when the contract was executed.” *12 Am. Jur.* 812, Section 265.

“The obligation of contracts is, in general, limited to the parties making them. In order to bind a third person contractually, an expression of his assent is necessary.” *12 Am. Jur.* 514, Section 17.

Nor can any provision of the Lanham Act impose any obligation on Barnett, Owens and Ester:

“The law will not imply a contract to do a thing merely because a statute imposes a duty to do that thing. It has been said that neither a statute nor a rule of law raises an implied promise. There must always be the fact of a consideration outside of and in addition to the statute or the rule of law; and the promise is implied rather from the consideration than from the statute.”
12 Am. Jur. 504, Section 6.

Reverter to Appellants

The government can show no paramount title, and having no rights whatever, it cannot convert an action for exclusive possession into one for rents for use of improvements, i.e., against a landowner not a party to the contract.

The law is well settled that upon abandonment of private property taken for public use, the owner of the fee holds the land free of encumbrance.

“ . . . When, however, only an easement has been acquired for the public use, by condemnation, purchase, prescription, or dedication, if the use for which the land was taken is formally discontinued, permanently abandoned in fact, or *becomes impossible* or the land is devoted to a different and inconsistent use, the easement expires and the owner of the fee holds the land free from encumbrance. *In any such event the right to*

possession does not remain in the condemning party, but reverts to the owner of the fee." (Italics added).

18 Am. Jur. 747, Sec. 124.

The rule is stated in 3 Nichols, Eminent Domain (3rd Ed.), section 9.36 (5), and (6):

"When only an easement has been taken, it is within the power of the corporation holding the easement to remove its *structures* from the land prior to abandonment; but if they are *allowed to remain after the possession has reverted in the owner of the fee the ownership of the structures follows the land*. So, also, when the effect of the structures is to protect the owner's remaining land from injury, it has been held that he is entitled to have them remain.

"After the public easement has been lost by discontinuance or abandonment, *it is as if it had never existed*, and it cannot be restored by revoking the order of discontinuance, or by attempting to resume possession, or in any other way than by a new condemnation proceedings and the payment of full compensation." (Italics added.)

"The United States is required to pay just compensation for the property taken and if just compensation has not been paid, and its officers wrongfully hold possession, they may be ejected. *U.S. v. Lee*, 106 U.S. 196 1 S.Ct. 240, 27 L.Ed. 171.

“If in the proceeding here, or in any condemnation proceeding where the judgment was given in the exact language of the declaration here, but the United States deposited only the rental value for one year and paid nothing for a property interest attempted to be created by such language for an additional period, the United States could hold only for one year under the judgment. *It is axiomatic that the United States will obtain only the exact property for which ‘just compensation’ has been paid no matter what the recitals of the judgment. An attempt to exercise the so-called option would be invalid.* At the end of the year the landowner would be entitled to maintain ejectment notwithstanding the inclusion of such language in the judgment.” *United States v. Crown-Zellerbach Corp.*, 60 F. Supp. 853, 860.

“Where there is delay in the payment of a condemnation judgment, it cannot reasonably be said that its payment at some later date will amount to just compensation, because the owner in such cases is deprived of the full and beneficial use and enjoyment of his property without legal process or compensation.” *Feldman vs. Chicago*, 363 Ill. 247, 2 N.E. 2d 102, 105).

In *Thomison v. Hillcrest Athletic Assn.*, (Del. 1939), 5 Atl. 2d 236, the plaintiff brought an *action in trespass* against the athletic association on the ground that title to the property, originally taken by condemnation for school purposes, reverted to plaintiff upon its abandonment for school pur-

poses and prior to its conveyance to defendant. In the course of its opinion, the court said:

“The right of individuals in the ownership of property must, of necessity, bend to the requirements of public use and so the right of eminent domain had its origin The use must be a public use and the Constitutions, both Federal and State, have added the further limitation that private property *may not even be taken for public use without just compensation.*

“Having in mind that private ownership of property must give way to a definite public need or to a desire to subject that property to a public use, but because the right to own and to retain property is one of the most cherished and sacred rights of a free man so the *Courts have rather uniformly considered that Statutes providing the right of eminent domain should be strictly construed* The *strict construction* of eminent domain statutes applies both to the amount of property to be taken and *to the quantum of the estate or interest*, and it is generally held that unless the statute provides that a fee simple title shall be acquired, or a fee is necessary for the purposes for which the land is taken, that only an easement or qualified fee is taken by the eminent domain proceeding.

“A reversioner in an eminent domain proceeding has no general power to accelerate his right of reversion and it is a mere dormant right dependent upon the ac-

tion of that party for whose benefit the property was condemned.

“The mere fact of improvements or transformations are not unusual on lands taken by condemnation and cannot in themselves change rules of law except by clear application.

“We see nothing in the statute which expressly or by implication changes the rule of law to the effect that while private ownership must give way to the public use yet when that public use is voluntarily and finally relinquished the property reverts to him from whom it was adversely taken.” (Italics added.)

Where a railroad was granted a right of way and laid track on it, and afterward abandoned the road, without removing the rails, they became the property of the owner of the land through which the right of way passed. *Missouri Pac. Ry. Co. v. Bradbury*, 106 Mo. App. 450, 79 S.W. 966.

Naturally enough the rule of reverter finds expression most frequently in the law of landlord and tenant. Reversion, because of abandonment or failure to pay just compensation in condemnation cases, is less frequent. But reversion is strictly applied in condemnation cases because acquisition of private property for public use is not a matter of contract, but of involuntary taking.

In *Toellner v. McGinnis* (1909), 55 Wash. 430, 435, 104 Pac. 641, in an action by the tenant for rents and two-thirds of the value of a building, Judge Chadwick said:

“ . . . we are of the opinion that the default in rent and re-entry, under the terms of the lease, work a forfeiture of all right to rents subsequently earned . . . ”

“It must also be admitted that the right to remove improvements or exact pay therefor, after the term, depends entirely upon the contract of the parties and was unknown to the common law — ‘a strong invasion upon it,’ as has been aptly said. There is another fundamental principle that suggests itself . . . and that is that, whatever may be the form of the contract or manner of stating it, the building becomes, as it is erected brick by brick and stone upon stone, a part of the land. So that, after all, from the very nature of things, the question is not a question of title reserved in the lessee, or the right to maintain title on the part of the lessor, but primarily a question of compensation; a right, if any, to recover the value of the building or declare a lien and enforce it as an equitable remedy. When so considered, the only question remaining is whether, under all the facts, appellants are entitled to such compensation. A similar contract was before the court in *Kutter v. Smith*, 69 U.S. 491, 17 L.Ed. 830, wherein it was held that, in the absence of a covenant to remove within the term, the contract did not change the rule that the building became a part of the land and the title was in the lessor. . . .

“By the terms of the contract respondent had the right to re-enter in case of default in rent, without any engagement to account for the rent or profits thereafter accruing, and whatever the phraseology of the contract may be, if our theory be correct, a forfeiture resulted. Or, if another term be softer, the lease and all defendants’ rights thereunder were voluntarily surrendered. . . . That another takes the fruit of their labor is attributable to their own fault, and the law cannot relieve them (Citing cases).”

Kutter v. Smith, 69 U.S. 491, 17 L.Ed. 830, was an action against the fee owner, to recover damages for the value of a building placed on leased premises. Upon the tenant’s failure to pay rent, the landowner retook possession, and Justice Miller said, in part:

“The character of the building, in the present case, does not bring it within any of the principles upon which certain erections have been held removable as fixtures.

“The doctrine, concerning this class of fixtures which is a strong innovation upon the common law rule that all buildings become a part of the freehold as soon as they are placed upon the soil, has extended no further than the right of removal while the tenant is in possession; *and has never been held to give a right of action against the landlord for their value.*

“The well settled rule is, that such erections as this

become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contract. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event. This contingency has not occurred, and that it can never occur is the *fault of the plaintiff* and his assignor. This observation is also applicable to the supposed hardship of taking the building, the product of the plaintiff's money and labor, without compensation. It is from plaintiff's own default that the right to do this arises. *He had his option to pay the rent due defendant, and retain the right to payment for his building, when the time should arrive, or to give up his building, and with its loss relieve himself of the burden of paying rent. He chose the latter with the full knowledge, and there is no injustice in holding him to the consequence of his choice.*" (Italics added.)

Our own Ninth Circuit Court of Appeals, in *Societa Italiana Di Mutua Beneficienza v. Burr* (1934), 71 F.2d 496, applied the rule. The syllabus states:

"Tenant's right to remove fixtures expires with forfeiture or other termination of lease."

“An easement acquired by condemnation ceases when the public use ceases. . . . The owner of the fee has a right to recover the property or to re-enter and to use it just as though it had never been condemned, possession and all other incidents of dominion and ownership reverting to him.” 30 *C.J.S.* 219, § 460.

“The rights acquired by condemnation proceedings may be lost by abandonment. An abandonment will be more readily inferred where an easement is acquired for public purposes than where it was created for a private use.

“Abandonment is made up of two elements, acts and intention. . . . The abandonment need not appear on record. . . . Whether there has been an abandonment is ordinarily a question of intention, to be determined by the jury, or the court sitting without a jury, from all the circumstances. . . . ” 30 *C.J.S.* 217, § 458.

In summary, the Supplemental Findings of Fact I. and II (R.107-108) and Conclusion of Law I. (R.111) which state that the plaintiff failed to prove its exclusive right of possession of the land, do not support a judgment against Barnett, Owens and Ester. Nowhere in the Findings is a determination made that Barnett, Owens and Ester were parties to the contract upon which this action is based. No other theory of liability and damages is raised in the pleadings or suggested in the Findings. The Findings do not support the judgment and it follows that the judgment must

be reversed as to these appellants.

In law, upon the abandonment of private property by the condemnor, the property reverts in the owner of the fee, together with the improvements placed thereon. This well-settled principal of law makes mandatory a dismissal of this action as to Barnett, Owens and Ester. Upon plaintiff's failure to prove its right to possession of the property under the judgment of condemnation, all rights of the plaintiff in and to the land and the structures on it terminated and title thereto reverted in the owners of the property, Barnett, Owens and Ester. There can be entered in this action no judgment against Barnett, Owens and Ester for the use of their own property or the improvements thereon.

ARGUMENT ON SPECIFICATION OF ERROR No. 2

The trial court denied (R.48) the motions of Barnett, Owens and Ester to dismiss the action as to them because the plaintiff's complaint failed *to state* a claim. The trial court also denied (R.119) their motion to dismiss them after trial for plaintiff's failure *to prove* a claim on which judgment could be based (R.118, item II).

The following summary of the complaint shows that the motion to dismiss these appellants for failure to state a claim should have been granted.

The complaint (commencing R.3) alleged that on July 14, 1953, the defendants A. E. Sherman, Virgil J Pague and Century Investment Corporation entered into a contract in

ARGUMENT ON SPECIFICATION OF ERROR No. 2 (Cont.)

writing with the Director of Public Housing Administration (R.4) for the sale and removal of buildings, and for site clearance. The contract further provided that the purchaser would be liable for any expense incurred by the government as a result of purchaser's failure to abide by the terms of the sale, including removing of the units sold within the time stated and leaving the site in a satisfactory condition. The time for completion under the contract was November 2, 1953. On the date of the contract, a performance bond in the sum of \$5,000.00 was executed by Century Investment Corporation, thru Virgil J Pague, its president, as principal, and by the Hartford Accident & Indemnity Company, as surety, in favor of the Housing Authority, City of Seattle, Washington. The complaint stated that the Authority was "acting as the agent of the Public Housing Administration, to insure the condition that the obligation of the Century Investment Corporation that it would do all the work and furnish all the materials for the removal of buildings and site clearance and faithfully perform all the conditions of said contract." (R.7)

The buildings were described in the complaint as not having been removed.

By paragraph VIII of its complaint the plaintiff alleged, "that the plaintiff, The United States of America, *at all times herein mentioned*, had and does now *have exclusive use of*

ARGUMENT ON SPECIFICATION OF ERROR No. 2 (Cont.)

said real property upon which said temporary dwellings are presently located and the acts of the defendants alleged herein have damaged and are damaging the plaintiff's exclusive use of said land and are in flagrant violation of the laws of the United States of America relating to temporary war housing." (Emphasis added.)

The complaint (R.7, par. VI) alleged that A. E. Sherman, Virgil J. Pague, Arthur G. Barnett, Carl W. Pague, Donald F. Owens and Edward R. Ester, individually and in behalf of the marital communities, purchased four of the temporary buildings (R.6) from the Century Investment Corporation in violation of the terms of the contract, and rented the dwellings. This is the only place that joint appellants Arthur G. Barnett and Donald F. Owens, acting as a partnership and joint appellant Edward R. Ester are mentioned in the complaint; they appear as third party purchasers, not as parties to the contract, and deny they bought from Century Investment Corporation.

It is alleged that the defendants and each of them knowingly acted in direct violation of paragraph 8 of the contract, Ex. "B" (R.13), which provided that "neither this contract nor any interest therein shall be assigned or transferred by the purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15)." No evidence was offered of an assignment involving Barnett, Owens and

Ester; plaintiff assisted Sherman and appellant Virgil J. Pague in assigning to Century Investment Corporation (R.65-66).

Plaintiff prayed that the surety company be ordered to remove the buildings in accordance with the contract, that the parties be restrained from interfering with the plaintiff's interest in the real property and temporary buildings, and for damages for failure of Century Investment Corporation to complete its contract by November 2, 1953, thus requiring the plaintiff to extend the term of exclusive use of said property from Feb. 1, 1954 to Feb. 20, 1955. Plaintiff also prayed for an accounting by all parties of funds collected from tenants or other sources for unauthorized use of the temporary buildings and the land upon which they were situate, for a reasonable rental to the plaintiff for the use of the property by the defendants, and that title of defendants to the temporary building be forfeited and that the plaintiff have the full and complete title thereto free from all encumbrances.

Plaintiff should have pleaded its title by condemnation, setting forth its payment of the just compensation required by the decree of condemnation. The mere allegation of exclusive possession was and is insufficient.

The appellants answered the complaint as follows:

The answer of Ester (commencing R.24) denied that he and his wife were parties to the contract; admitted purchase of Building 105 and that the same was being rented; denied that it was purchased from Century Investment Corporation

and denied acting in violation of any contract or any law (R.25). Ester further denied that plaintiff had exclusive use of the real property and the temporary buildings and further denied taking an assignment of any interest in the contract (R.25).

As additional defense, Ester alleged there was no privity of contract between himself and the plaintiff and that he was under no contractual or legal obligation to remove the housing purchased (R.25-26). That the housing was not temporary and that it was not within the purview of the Lanham Act; that to require removal of Building 105 would be inequitable, unjust and oppressive and deprive Ester of his property and property rights without due process of law; that Ester in good faith expended large sums of money in improving and converting Building 105 from temporary into permanent housing, and to purchase the land on which the building was situate, the removal of which would cause the defendant grave financial loss, and would be of no benefit or advantage to the plaintiff, and that the plaintiff would suffer no damage whatever if said building is not removed from its site.

As a first affirmative defense (R.27) he alleged that the Public Housing Administrator sold the buildings to the Century Investment Corporation, vesting said purchaser with full power and authority to resell the housing and to vest the re-purchasers with full legal title; that thereafter Century Investment Corporation sold Building 105 to one Carl W.

Pague who in November of 1953 resold and delivered Building 105 to Ester for a valuable consideration; that before purchasing the building Ester inquired as to the right to keep it on site and rent it; that Virgil J. Pague, individually and as president of Century Investment Corporation, stated and represented that it was lawful and proper to keep the building on site, provided it was remodeled and renovated in compliance with the Building Code requirements of the city of Seattle; further, that other buildings involved in the contract had been rented for months with the full knowledge, permission and acquiescence of the Public Housing Administrator; that Ester had talked with the agent of the Public Housing Administrator and was assured by him that Building 105 could be lawfully rented on site and that it would not be necessary to remove it, provided it was made to comply with the Building Code of the City of Seattle; that relying on these reassurances, Ester purchased Building 105 and the land upon which it was situate and, under proper permits from the city of Seattle, renovated it in compliance with the Building Codes of the city, removing and replacing plumbing and connecting sewers, installing new oil burners and storage tanks, placing new siding on the exterior, reinforcing the foundations, renovating and rebuilding the kitchens, installing new gas ranges and new refrigerators, and doing other work to convert the temporary housing into permanent housing in compliance with the Building Codes; that the amount expended for said buildings, land and im-

provements was in excess of \$16,000.00. That Ester was led to believe by the fact that other buildings on site were being rented without molestation or interference by the plaintiff that it was lawful so to do and that plaintiff had waived its requirements for their removal.

For a second affirmative defense, Ester alleged that the judgment in the condemnation proceedings, under which the plaintiff was granted the right to lease the land underlying Building 105, provided for a year-to-year tenancy, commencing February 21 of each year upon notice, and that the plaintiff had failed to obtain the consent of Ester to renew its lease and, further, *that plaintiff had failed to pay or tender the rental due* therefor prior to February 21, 1954; that by reason of such failure the *plaintiff had either abandoned the lease or waived or lost its right* to renew the same; and that since February 21, 1954, the plaintiff has not had and did not have any right to the use of the land owned by defendant on which Building 105 is situate and no right or title whatever in the land or building and that the plaintiff was without any legal right to enter upon the land for any purpose whatsoever without order of court or the consent of Ester.

Barnett and Owens repurchased Building 104. Their answer (commencing R.39) in most material respects is the same as that of Ester. They admit the purchase of Building 104 and admit that apartments have been rented. They denied that they purchased the building from Century Invest-

ment Corporation and further deny that Building 104 is temporary. They denied taking any interest by way of assignment; and *denied that plaintiff had exclusive possession of the real property upon which Building 104 was located.*

By way of additional defenses, Barnett and Owens alleged that the complaint failed to state a claim against them; that they were not parties to the contract for the violation of which damages were sought by the plaintiff, that Building 104 had been changed from temporary to permanent housing in compliance with the codes of the city of Seattle governing the occupancy of dwellings by human beings; and that the removal of permanent housing would not be in the public interest.

For a fourth defense, they claimed that the plaintiff had abandoned its use of the land, and asserted that they had expended the sum of \$17,484.91 for the purchase of the land underlying Building 104; and that the plaintiff was, without good reason, attempting to renew its lease for the sole purpose of clearing the land, only to return it to Barnett and Owens so that plaintiff would not be subject to an action for damages for failure to clear. For a fifth defense, Barnett and Owens alleged that the plaintiff was attempting to deprive them of their property without due process of law.

For a first affirmative defense, Barnett and Owens alleged that, during the latter part of November, 1953, they were advised that Buildings 102 and 103 were occupied by tenants, that the city of Seattle had allowed occupancy of these

buildings after compliance with the Seattle Building Codes, that the plaintiff had advised that, if the title to the lands and the units were merged and Building 104 was made to comply with the Building Codes, this would constitute a removal under the laws of the United States. Relying thereon Barnett and Owens repurchased a portion of Building 104 from third party purchasers R. M. Scougal and F. T. Crowe (R.69c) who purchased from Century Investment Corporation, the remaining portion of Building 104 being repurchased from Virgil J. Pague for the sum of \$4,696.00. That they thereafter expended, to comply with the Building Codes of the city of Seattle, approximately \$17,337.14, excepting \$3,100.00 thereof used for the purchase and installation of new gas stoves, meters, new Westinghouse refrigerators, and that an additional sum was being expended on the heating plant and heating system; and that it would be a useless act and expense to compel Barnett and Owens to remove Building 104.

After the formulation of the issues by the answers and after trial the effect of the motion to dismiss for failure *to prove* a claim on which judgment could be based, becomes doubly clear. As a matter of law, Barnett, Owens and Ester should have been dismissed for there is no legal basis on which judgment for damages can be entered against them.

It is not alleged, and it is not proved, that Barnett, Owens and Ester are parties to the contract for a breach of which

damages are assessed. No other theory of liability is alleged or proved.

It follows that Barnett, Owens and Ester as owners are not accountable for rents received as determined by any report of the Special Master. Any damages suffered by the plaintiff for breach of its contract must be recovered from the parties thereto or their assignees, if any. The assignee of A. E. Sherman was the Century Investment Corporation. This leaves the judgment for damages, based on the accounting of rents received for breach of contract, good against Virgil J. Pague, the principal of A. E. Sherman, who originally signed the contract, and the assignee, Century Investment Corporation.

Actually, as exhibits offered at the trial, there are indemnity agreements running from Virgil J. Pague to Century Investment Corporation (Ex. 17 for Bldgs. 102 & 103; Ex. 18 for Bldgs. 104 & 105). The pattern of liability for the breach of the contract on which this action is based, is clear. Barnett, Owens and Ester are not liable under any theory or under the facts adduced at the trial.

The motion to dismiss for failure to state a claim against these appellants should have been granted. The motion to dismiss for failure to prove a claim on which judgment against these defendants could be based certainly should have been granted.

ARGUMENT ON SPECIFICATION OF ERROR No. 3

This specification of error is directed toward the report and supplemental report of the Special Master (R.84, 85-91) and the objections to these reports by Barnett, Owens and Ester (R.97-105 incl.). The errors of the Special Master were carried into the judgment for damages, and his use of improper accounting methods as to these appellants seriously prejudiced Barnett, Owens and Ester.

On October 21, 1955, the court entered its order directing a reference and appointing a Special Master (R.82-83). This order provided that the Special Master "report to this Court his findings of fact and conclusions thereon as to the total profit. . . ." The accounting was to be made from original records and the total profit "shall be the difference between the total gross revenue received from the commercial use of each of said buildings and the current or normal operating expenses of each; except that said expenses may also include depreciation, based on current Internal Revenue Service useful life standards, for the minimum capital expenditures only, necessarily incurred in conforming said buildings to requirements of the city of Seattle."

The Special Master filed a report on the 16th of December, 1955 (R.133, item 95), only a portion (R.84) of which is set forth in the record, for two reasons: First, the Supplemental Report of the Special Master was the one used by the

court (R.107) and it was filed on January 18, 1956 (R.85); secondly, the portion set forth from the first report (R.84) was inserted for comparison with similar matter set forth in the Supplemental Report (R.89). Although the trial court in its Supplemental Findings of Fact and Conclusions of Law (R.107) refers to having theretofore entered an Order approving and confirming the Supplemental Report of the Special Master filed on January 18, 1956, the court does not thereafter make the Supplemental Report of the Special Master a part of its findings although the court does adopt the Special Master's computations (R.115).

a) Maintenance and repair items were capitalized and were not allowed as expenses to be deducted against current income of Barnett, Owens and Ester, when similar items were allowed as expense deductions for Pague against current income (R.100, par. VI - R.102). The result was to allow 100% of the expense items to be deducted by Pague in the year they were incurred while allowing only a deduction of 20% for the same items in the year they were incurred by Barnett, Owens and Ester, leaving the balance of 80% to be recovered by Barnett, Owens and Ester over a future period of approximately twenty years (R.100, par. VI; R.88, Ex. "B"; R.90, Ex. "C"). The record (R.100-102) covers numerous examples of such unjustified discrimination. For example, Pague is allowed a deduction of 100% of the cost of windows while Ester is allowed only 20% on similar glass items; Pague is allowed a deduction of 100% for electrical

repairs while Barnett and Owens are allowed only a deduction of 20% for electrical repairs. The exceptions cited in the record disclose similar discrimination for boiler room motor repair, lumber and burner repair, window shades, refrigerator repair, painting, faucets and plumbing items and garbage cans. If the cost of his garbage cans may be deducted 100% in one year for one litigant, why should the other litigants have to wait twenty years to recover the cost of their garbage cans?

Error is further claimed in the disallowing of miscellaneous and small expenditures made by Ester on the ground that they could not be supported by receipts while similar and identical items not supported by receipts as deductions by Pague were allowed. Expenditures claimed but not supported by vouchers by Ester amount to the sum of \$1,809.85 (R.90, item 1). But, the Master allowed Pague deductions of \$2,066.24 for expenditures claimed but not supported by vouchers (as set out in detail on R.98, par. V - R.100, up to but not including item "B"). In addition, the Master allowed to Pague an allocation of \$2100.00 as repair and maintenance from Uptown Motors without receipts or vouchers (R.99.)

Comparing the allowances made by the Master for fuel costs, further error is apparent. The Master allowed Pague a deduction for fuel of 33.224% of gross income; he allowed Barnett and Owens a deduction of 20.283% of gross income; and he allowed Ester only 11.850% of gross income, as a total

of fuel and truck expense (R.105, Ex. "J").

As the result of these maneuvers by the Master, Pague was allowed a large percentage of his gross income as deductible expense in the years incurred. Pague was allowed 68.003% of gross income as deductible expense, as contrasted with 39.293% for Barnett and Owens and 36.455% for Ester (R.105, Ex. "J", line "total operating expenses"). Correspondingly and because the Master arbitrarily capitalized repair and maintenance expense for Barnett, Owens and Ester, his depreciation figures for Barnett and Owens of 20.372% of gross income and for Ester of 20.693% of gross income are three times larger than Pague's depreciation of 7.202% of gross income.

In summary, this resulted in making Barnett, Owens and Ester's income look large and Pague's small, as follows:

	Gross		Net	
	Receipts		Profit	In
	in Dollars	Percentage	in Dollars	Percentage
Pague	\$27,284.52	100%	\$6,765.13	24.795%
Barnett & Owens.....	13,097.35	100%	5,282.81	40.335%
Ester	8,785.10	100%	3,764.58	42.852%

The net income figures set out above were the basis upon which judgment was rendered against these appellants, and because they were incorrectly computed by the Master their infirmity was carried into the judgment and the judgment itself is erroneous.

(b) Error is claimed in the exception (R.103, par. X) that the Master used a 30-year basis for depreciation on a sum of the digits method. The ruling of the court is set forth at R.115. The Master ignored the order of reference (R.83) which instructed the Master to allow depreciation based on current Internal Revenue Useful Life Standards (R.83, lines 3 to 6). The Master also ignored the 5-year limitation imposed by the City of Seattle's permit for the use of city streets and alleys upon which a portion of the units are situated (R.73). The Master also ignored the 5-year use and occupancy permit granted by the City of Seattle for the buildings owned by the appellants (R.73). Whether or not the 5-year permit would be enforced, Barnett, Owens and Ester, under the Internal Revenue requirements, were compelled to claim the 5-year limitation in their useful life computation on their own tax returns (Def's. Ex. 16) in accordance with the Internal Revenue Service Useful Life Standards (R.94; 103, par. X;)

(c) The inconsistencies in the Master's own reports show clear error. In his original report he showed a net profit for appellant Ester of \$3,660.91 (R.85). As a result of a revision in the Master's supplemental report the net profit for Ester is increased to \$3,764.59. (R.90). A resulting increase in net profit of \$103.68 despite an additional allowance for truck expense of \$431.74 (R.84, line 13; R.90, line 6).

The inconsistent method by which this is accomplished is summarized as follows:

	Original Report (R.84 & 85)	Supplemental (R.89 & 90)	Difference Allowed (+) Disallowed (-)
Maintenance Labor	\$1,035.04	\$806.62	\$ -228.4
Maintenance Material	832.23	279.87	-552.3
Truck Expense	250.69	682.43	+431.7
Depreciation	1,572.50	1,817.86	+245.3
TOTAL — Deceased Expenses Allowance,			\$ -103.6

If the Special Master had been consistent in his own work the additional truck expense allowed in his supplemental report would have reduced the Net Profit by \$431.74 instead of increasing it by \$103.68 or a total difference of \$535.4 which is 16 2/3% of the judgment against Ester.

(d) The joint appellants Barnett and Owens claim a error that the fee allowed the Special Master in the sum of \$2500.00 is exorbitant, and that the Special Master did poor work examples of which are (a), (b) and (c). He was appointed October 21, 1955 and handed in his first report, as stated above, on December 16, 1955, within a period of little less than 60 days. The accounting involved total rent in the sum of only \$48,877.97. For the amount of time involved and considering that the original records were furnished (Special Master's Exhibit and Supplement Report Doc 107) the fee is exorbitant. It is far in excess of the compensation for a U.S. District judge.

The clerk's certificate (R.126, items 95 through item 116) reflects constant motions by the defendants to strike the report of the Special Master because of his attempts to file con

rary to F.R.C.P. Rule 53(e)(1); thus compelling Barnett, Owens and Ester to force the filings of the Special Master's exhibits, records and transcripts in order to preserve their right of judicial review. Since these motions and the Special Master's reports are all exhibits and accompany the Special Master's reports now before this appellate court, it is believed this reference is proper (R.126, items 95-116). It is asserted here to indicate along with defendants' exceptions the poor work of the Special Master.

Conclusion

Joint appellants, Barnett, Owens and Ester, should be dismissed and the judgment of the trial court reversed as to them.

Respectfully submitted,

VERNON W. TOWNE,
ARTHUR G. BARNETT
ALEC DUFF

Attorneys for Appellants
Barnett, Owens and Ester

No. 15219

**In the United States Court of Appeals
for the Ninth Circuit**

**CENTURY INVESTMENT CORPORATION AND VIRGIL J.
PAGUE, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS
WIFE; DONALD F. OWENS AND JEAN OWENS, HIS
WIFE; AND EDWARD R. ESTER AND LORRAINE M.
ESTER, HIS WIFE, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVI-
SION**

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General,

CHARLES P. MORIARTY,
*United States Attorney,
Seattle, Washington,*

JOHN A. ROBERTS, JR.,
*Assistant United States Attorney,
Seattle, Washington,*

**ROGER P. MARQUIS,
HAROLD S. HARRISON,**
Attorneys,

Department of Justice, Washington, D. C.

FILE

JAN 31 1957

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	2
Questions presented.....	2
Statement.....	2
Summary of argument.....	12
Argument:	
Introductory.....	13
I. There was a clear breach of contract by Century such as would justify equity compulsion to remove the buildings which was denied and the remedy of damages substituted only because of subsequent events; and appellants Pague, Barnett, Owens and Ester had knowledge of, and participated in, those breaches.....	13
II. The damages awarded in lieu of specific performance were not excessive.....	20
III. The findings by the district court which are challenged by the appellants are not clearly erroneous and so should not be disturbed on appeal.....	22
A. The attempt to support error on the lack of a determination of damages by the Government's Contracting Officer is obviously fallacious.....	23
B. Appellants' argument that the court erred in ordering an accounting (Century Br. 18-33) and their challenge of the Special Master's work (Century Br. 39-44) contain many fallacies and do not warrant reversal of the judgment entered by the district court.....	26
C. The district court's supplemental findings and conclusions do not require a reversal of the judgment which it entered.....	32
D. The argument by appellants Barnett, Owens and Ester (Barnett Br. 29-38) that the district court erred in denying dismissal as to them is clearly without merit.....	34
Conclusion.....	35
Appendix.....	36

CITATIONS

Cases:	
<i>Angle v. Chicago, St. Paul &c. Railway</i> , 151 U. S. 1.....	16, 18
<i>Boyce v. Chemical Plastics</i> , 175 F. 2d 839, certiorari denied, 338 U. S. 828.....	31
<i>Campbell v. United States</i> , 266 U. S. 368.....	32
<i>Carpenter v. Providence Washington Ins. Co.</i> , 4 How. 185.....	17
<i>Causby v. United States</i> , 328 U. S. 256.....	32

II

Cases—Continued

	Page
<i>Cooper v. Brown</i> , 126 F. 2d 874.....	31
<i>Empire District Electric Co. v. Rupert</i> , 199 F. 2d 941, certiorari denied, 345 U. S. 909.....	31
<i>Frank Adam Electric Co. v. Colt Patent Fire A. Mfg. Co.</i> , 148 F. 2d 497.....	31
<i>Hurley v. Kincaid</i> , 285 U. S. 95.....	32
<i>Keystone Co. v. Excavator Co.</i> , 290 U. S. 240.....	19, 26
<i>Parker v. United States</i> , 126 F. 2d 370.....	31
<i>Prentice v. Boteler</i> , 141 F. 2d 175.....	31
<i>Ralston Purina Co. v. Novak</i> , 111 F. 2d 631.....	31
<i>Reed v. Murphy</i> , 232 F. 2d 668.....	23
<i>Seagram-Distillers Corp. v. New Cut Rate Liquors</i> , 221 F. 2d 815..	31
<i>Schilling v. Schwitzer-Cummins Co.</i> , 142 F. 2d 82.....	31
<i>Shanks Village Residents Association v. Cole</i> , 219 F. 2d 28, certiorari denied, 349 U. S. 906.....	15
<i>Stonesifer v. Swanson</i> , 146 F. 2d 671, certiorari denied, 325 U. S. 880, rehearing denied, 326 U. S. 805.....	30
<i>United States v. Certain Parcels of Land in Cheyenne</i> , 141 F. Supp. 300.....	15
<i>United States v. Certain Parcels of Land in King County, Washington, et al.</i> , Civil No. 1143.....	3
<i>United States v. Certain Parcels of Land in Potter Tp.</i> , 102 F. Supp. 691.....	28
<i>United States v. Merchants Transfer & Storage Co.</i> , 144 F. 2d 324..	32
<i>United States v. United Enterprises</i> , 226 F. 2d 359.....	23
<i>United States v. Wunderlich</i> , 342 U. S. 98.....	23
<i>Werner v. United States</i> , 233 F. 2d 52, certiorari denied, 352 U. S. 842.....	28
<i>Westchester County Park Commission v. United States</i> , 143 F. 2d 688, certiorari denied, 323 U. S. 726.....	31
<i>Woods v. Miller Co.</i> , 333 U. S. 138.....	27
<i>Yearsley v. Ross Constr. Co.</i> , 309 U. S. 18.....	32

Statutes:

<i>Lanham Act</i> , 54 Stat. 1125, as amended, 64 Stat. 48, 42 U. S. C. sec. 1521.....	14, 15, 28
Sec. 313.....	15
Sec. 604.....	14, 15
Act of July 3, 1952, 66 Stat. 330.....	27
Act of March 31, 1953, 67 Stat. 18.....	27
Act of May 11, 1954, 68 Stat. 81, 41 U. S. C. sec. 321.....	25

Miscellaneous:

Executive Order 10339, 17 F. R. 3012.....	15
Federal Rules of Civil Procedure, Rule 52 (a).....	25
Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449..	27
Presidential Proclamation 2974 of April 28, 1952, 66 Stat. C31..	27, 28
89 Cong. Rec. 6873, 6886, 6888.....	15
96 Cong. Rec. 3159, 3216.....	15

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15219

CENTURY INVESTMENT CORPORATION AND VIRGIL J.
PAGUE, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ARTHUR G. BARNETT AND VIRGINIA N. BARNETT, HIS
WIFE; DONALD F. OWENS AND JEAN OWENS, HIS
WIFE; AND EDWARD R. ESTER AND LORRAINE M.
ESTER, HIS WIFE, APPELLANTS.

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVI-
SION

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. An oral decision of the district court on September 7, 1955, as transcribed by the court reporter, is set out in the Appendix, *infra*, pp. 36-40. Findings of fact and conclusions of law by the district court appear in the record at pages 62-81, 107-113.

JURISDICTION

These are appeals from an order entered by the district court on April 26, 1956 (R. 114-117). The jurisdiction of the district court was invoked by the United States under 28 U. S. C. sec. 1345 (R. 3). A motion to alter or amend the judgment and decree filed May 7, 1956, was denied June 4, 1956 (R. 118-119). Appellants' notices of appeal were filed on June 27, 1956, and July 31, 1956 (R. 120-121). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1291.

QUESTIONS PRESENTED

1. Whether, in view of the fact that appellants knowingly violated statutory and contractual rights of the United States, the district court erred in requiring the appellants to account for the profits derived by them as a result of their wrongdoing.

2. Whether the damages awarded in lieu of specific performance were excessive.

3. Whether the findings by the district court are clearly erroneous.

STATEMENT

On October 4, 1954, the United States filed its complaint seeking redress for the violation of its rights growing out of the failure of the appellants to remove temporary war housing from lands held for the exclusive use of the United States (R. 3-22). The material facts may be summarized as follows:

By condemnation proceedings instituted during World War II the United States acquired exclusive temporary use of land in Seattle for a temporary

housing project. Such a project [WASII-45302] was constructed under the authority of the Lanham Act, 54 Stat. 1125, 42 U. S. C. sec. 1521 *et seq.* The Government's term for the use of the land was extended through June 30, 1956. The district court took judicial notice of all the proceedings and files in the condemnation action¹ (Fdg. II, R. 63-64).

By amendments to the Lanham Act, Congress directed that "the Administrator shall, as promptly as may be practicable and in the public interest, remove (by demolition or otherwise) all housing under his jurisdiction which is of a temporary character * * *" (64 Stat. 48, 64, 72-73). In order to comply with this congressional mandate the Administrator of the Public Housing Administration, through the Housing Authority of the City of Seattle, issued public invitations for bids for the sale and removal of 10 temporary war housing buildings, containing 144 dwelling units, and for the clearance of the real estate site (Fdg. I, R. 62-63).

Mr. A. E. Sherman, at the request of appellant Virgil J. Pague, submitted a bid. Sherman "was a man of small means while he, Pague, had substantial assets, so that in the event of any subsequent trouble concerning said buildings, the financial assets of the said Virgil J. Pague would be protected" (Fdg. IV, R. 65). Sherman's bid was accepted. On paying the balance of the purchase price, Sherman advised Louis

¹ The condemnation proceedings are entitled *United States v. Certain parcels of land in King County, Washington, et al.*, Civil No. 1143, United States District Court for the Western District of Washington, Northern Division.

Michaelson of the Housing Authority of the City of Seattle that the payment was tendered on behalf of the Century Investment Corporation, then in the preliminary stages of organization, and to which Sherman assigned his interest in the bid. Virgil J. Pague was an incorporator and became president of Century and the contract was prepared in its name (Fdgs. III, IV, V; R. 64-66).

On July 14, 1953, the contract for the sale and removal of the buildings was executed by the contracting officer of the Public Housing Administration and was thereafter delivered to Century. Details of its incorporation were completed by Century on July 17, 1953, and thereafter it entered upon the work of selling and removing houses (Fdg. VI, R. 66).

On and after August 21, 1953, appellant Century Investment Corporation purported to convey four of the buildings in the project (Bldgs. 102, 103, 104, and 105, comprising 54 dwelling units) without imposing the condition or obligation that they be removed from site.² Those buildings remain on the site and are being used for private commercial dwelling purposes (Fdg. X, R. 68). Buildings 102 and 103 were purportedly acquired by appellant Virgil J. Pague from Century on August 21, 1953, and October 5, 1953, respectively. Thereafter Virgil J. Pague acquired an interest in the lots upon which buildings 102 and 103 were situ

² Paragraph 8 of the general conditions of the contract heretofore involved provides (R. 17):

"8. *Assignment.* Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U. S. C. 15.)"

ated. Building 104 was purportedly acquired by appellants Arthur G. Barnett and wife and Donald F. Owens and wife on January 20, 1954, in two parts, to wit; one portion from R. M. Scougal and F. T. Crow, who acquired same from Century on September 2, 1953, the remainder of the building being acquired from Virgil J. Pague and his brother, Carl W. Pague, who had acquired same from Century. Carl W. Pague possessed no real interest in the building. On January 20, 1954, appellants Barnett and Owens and wives jointly acquired an interest in the lots underlying building 104. Building 105 was purportedly acquired by appellants Edward R. Ester and wife in November 1953³ from Carl W. Pague, who had acquired the same from Century. Thereafter appellant Ester acquired an interest in the lots underlying building 105 (Fdg. XI, R. 68-70).

The lots underlying the buildings here involved are among the parcels of real estate the use of which was taken by the condemnation proceedings referred to previously (*supra*, pp. 2-3). None of the appellants herein possessed an interest in said lands at the commencement of those proceedings, they having acquired their respective interests after the date of the contract with Century for the sale and removal of the buildings. By the Declaration of Taking filed in the condemnation proceedings on June 15, 1945, and the judgment entered therein on June 16, 1945, and by subsequent Judgments Fixing Compensation entered in that action, the United States was granted the

³ The Findings of Fact mistakenly show this date as 1954 (R. 70, but see R. 27).

right to renew its exclusive use without the consent of the owners of the land from year to year, not to exceed three years after the termination of the National Emergency declared to exist by presidential proclamation of September 8, 1939 (54 Stat. 2643). The Government filed timely notice, yearly, of its intention to renew its exclusive use extending to February 21, 1956 (Fdg. XII, R. 70-71).⁴

The Housing Authority of the City of Seattle and Louis Michaelson, its employee, were granted limited authority by the Public Housing Administration to attend to administrative details concerning the sale of the project (Fdg. VII, R. 67). All of the appellants who dealt with the Housing Authority of the City of Seattle at the time the contract was made knew that that organization is and was a wholly different organization from that of the Public Housing Administration of the United States of America (Fdg. VIII, R. 67).

On or about November 12, 1954—the contract expiration date for removal of the buildings and clearance of the sites—Century importuned the Seattle Housing Authority for an extension of 60 days therefor (Pl. Exh. 9, *infra*, p. 41; Fdg. IX, R. 67). The Acting Executive Director of the Seattle Housing Authority purported to extend the time to January 15, 1954 (Pl. Exh. 10, *infra*, p. 42; Fdg. IX, 67).⁵

⁴ The Government further extended its exclusive use for another yearly period to February 21, 1957, but subsequently terminated its use as of June 30, 1956.

⁵ While the Seattle Housing Authority purported to extend the time for performance, the district court concluded that “there never was any general agency from the plaintiff to said organiza-

Appellants Century Investment Corporation and Virgil J. Pague, its president, of course, had full knowledge of the contract provision for the removal of the buildings. Appellants Arthur G. Barnett and wife, Donald F. Owens and wife, and Edward R. Ester and wife all had "full and complete knowledge" of the removal contract and they were not innocent purchasers for value (Fdgs. XIII, XIV; Concl. X; R. 71-72, 77-78).

Each of the appellants herein who now assert ownership of the buildings in question (Fdg. XV, R. 72-73):

before acquiring their respective interest and well knowing of the contract obligation of Century Investment Corporation to remove said buildings from site and well knowing that the exclusive use of the substantial portion of the land underlying said buildings was held for the exclusive use of the plaintiff [United States], inquired of the said Louis Michaelson and endeavored to secure through him some express waiver of said contract obligation; that such a waiver was never obtained by any one or more of said defendants; that they, and each of them, after purporting to acquire their respec-

tion [Housing Authority of the City of Seattle] or to Mr. Michaelson with power broad enough to generally authorize said organization or Mr. Michaelson to waive any of the terms and conditions of said contract" (Concl. V, R. 75). In this connection, the Public Housing Administration has advised: "There is no justification nor consideration for such an extension. The Seattle Housing Authority was not the agent of this Administration for that purpose. It was not a party to the Removal Contract." Determination of this matter is not required on these appeals.

tive interests, and in an effort to secure an express waiver of said contract obligation, secured a resolution of the City of Seattle, Washington, whereby that municipality permitted said buildings to remain on site for a period of five (5) years, and by action of the Seattle Board of Public Works defendants [appellants] now have, and plaintiff does not have and since Oct. 28, 1953 has not had, the use of the street area underlying said buildings, defendants having been granted said street use Dec. 9, 1953. Each of said buildings have by defendants been altered so as to comply with the City Code requirements.

The buildings not having been removed, the present action was instituted. The relief sought was (1) to require Century and its surety to proceed with the removal of the temporary buildings in accordance with the contractor's obligations and the mandatory requirement of the Lanham Act, (2) to restrain any interference with the Government's interest in the property, (3) for damages for the breach of contract, (4) for an accounting, (5) for reasonable rental for use of the buildings, (6) for forfeiture of the title of the defendants and declaration of the title of the United States free from all claims, and (7) for appropriate further relief (R. 8-10).

After a trial, an oral decision (*infra*, pp. 36-40) was made by the district court in favor of the United States. On October 20, 1955, findings of fact and conclusions of law were entered (R. 62-81). The court there found facts substantially as outlined above and reached conclusions warranting the relief sought.

On the occasion of delivering its oral decision, the court had announced its desire for further information concerning the question of the amount of damages to be awarded for the violations of the Government's rights (Oral decision, *infra*, p. 39). The court determined that since there was evidence that appellants made commercial use of the buildings, and such commercial use was carried on by the appellants from the site from which they were obligated to remove the buildings during the period complained of, an accounting was in order (*ibid.*, *infra*, pp. 39-40). Accordingly, the district court referred the case to a Special Master (Don S. Griffith, a practicing certified public accountant) for that purpose (R. 82-83). After hearings and the submission of evidence, income received by the appellants from the rental units, less the normal operating expenses, was determined by the Special Master who filed a report and supplemental report embodying his findings and conclusions.⁶ Various exceptions were filed to these reports (R. 91-105).

On April 26, 1956, after noting that it had "heretofore entered an Order approving and confirming the supplemental report of Special Master, filed herein on January 18, 1956," the district court went on to make supplemental and amendatory findings of fact and conclusions of law (R. 107-113). In doing so, the court abrogated its earlier position and declined to order specific performance of the contract of removal and site clearance. To aid in an understanding

⁶ Portions of those reports appear in the printed record at pp. 84-91.

of the district court's supplemental and amendatory findings and conclusions, a brief explanation becomes necessary of the judgments entered in the condemnation proceedings (Civil No. 1143) under which the Government acquired its exclusive use of the land underlying the buildings. The judgments there entered required the payment of certain specific rental payments "together with an amount equal to general real estate taxes lawfully levied and assessed" against the parcels in question. The administrative practice had been for the taxpayers to pay the taxes and then submit their tax statements to the Public Housing Administration for reimbursement. Deposits were not made in advance to cover the estimated amount of these taxes. The purchasers of the underlying lands here involved did not submit their tax statements and so were not reimbursed for the amount of the taxes. Apparently in order to avoid the forced removal of the buildings (which had been improved to meet the code requirements of the City of Seattle (*supra*, p. 8)), the district court apparently used the tax matter discussed above as justification for awarding damages only rather than ordering specific performance of the contract as it had previously determined.

Accordingly, after finding that it was incumbent upon the Government to prove its exclusive right of possession of the land upon which the buildings were situated and that the Government "has not proved that the future ascertainable installments of such just compensation have been paid" (Supp'l Fdgs. I, II;

R. 107-108), the court went on to find (Supp'l. Fdgd. III, R. 108-109):

That the present and only estate in the land here in question now claimed by the plaintiff expires on July 1, 1956, and the plaintiff has no present intention of renewing or extending said estate by virtue of any existing judgment or order of this Court; that upon that date, the defendants, so far as existing judgments and orders of court are concerned, will be entitled to the exclusive possession of said real estate, and it would be more burdensome to them, than advantageous to the plaintiff, to require the defendants to specifically perform this Court's previous contemplated order of building removal and site clearance. The Court finds that within about seventy (70) days of April 21, 1956, the defendants would have the right of exclusive possession of said lands and the right to move said buildings back on said lands; that from practical and compensatory standpoints the Court now finds that it is more just, considering the material equities and the law to, instead of compelling specific performance of removal and site clearance, require the defendants to pay a fair, reasonable, and just compensation by way of damages for their failure to remove and clear the sites of and for their wrongful commercial use of, said buildings and comply with all of the requirements of the contract of sale.

The district court then went on to find the amounts of damages to which the Government was entitled⁷

⁷ \$5,937.13 for Buildings 102 and 103 against Virgil J. Pague and Century Corporation. \$3,709.31 for Building 104 against

and the fee to be paid the Special Master (R. 109-111) and to make its supplemental and amendatory conclusions of law (R. 111-113). The earlier findings of fact and conclusions of law were "reaffirmed in their entirety except that they are modified only as to the specific details enumerated herein" (Supp'l Fdg. VII, R. 110).

The district court's judgment and decree was also entered on April 26, 1956 (R. 114-115). A motion to alter or amend the judgment and decree was denied (R. 118-119). These appeals followed.

SUMMARY OF ARGUMENT

1. There is a clear basis for requiring the appellants to account for the profits derived from the buildings here involved. Both under the law and by express contract provision the buildings were required to be removed from the sites upon which they were situated. *All* of the appellants had knowledge of the removal requirement and knowingly violated it. Under long-established equitable principles one is not permitted to derive a benefit from his own breach of duty and obligation or to enjoy, unmolested, property the possession of which was acquired by his wrongful acts. A court has broad discretion in exercising its equitable powers. There were wrongs by the appellants and the remedy accorded by the court below in the exercise of its equity jurisdiction should not be disturbed unless it should be decided that specific

Barnett and wife, Owens and wife, and Century Corporation. \$2,432.59 for Building 105 against Ester and wife and Century Corporation. Each award was against the named parties, jointly and severally (R. 68-70, 109-111).

relief by directing removal of the buildings is more appropriate.

2. The damages awarded by the court below in lieu of specific performance were not excessive. As a matter of fact, the awards by the district court are exceptionally fair to the appellants in that there is not included in them a number of items of damages to the United States which were caused solely as a result of the appellants wrongdoing.

3. The findings by the district court are not clearly erroneous so as to warrant being disturbed on appeal.

ARGUMENT

Introductory: While a brief has been filed by appellants Century Investment Corporation and Virgil J. Pague (referred to herein as Century Br. —) and a separate brief has been filed on behalf of appellants Arthur G. Barnett, Donald F. Owens, Edward R. Ester and their wives (referred to herein as Barnett Br. —), the Government sees no need to burden this Court with two briefs for the United States. Accordingly, arguments advanced in both briefs filed on behalf of the various appellants will be treated herein.

I. There was a clear breach of contract by Century such as would justify equity compulsion to remove the buildings, which was denied and the remedy of damages substituted, only because of subsequent events; and appellants Pague, Barnett, Owens, and Ester had knowledge of, and participated in, those breaches

The appellants contend that there is no basis for requiring them to account for profits derived from the buildings here involved. They argue that the only measure of damages is the fair rental value of the real

estate and that that item is fixed as the amount the Government paid annually for use of the land. They contend that the sale of the buildings was absolute; that any accounting of profits is unwarranted; that the accounting as determined by the Special Master is arbitrary and capricious, etc. But as indicated in the heading to this point, there is ample justification for the judgment entered by the district court.

Under Section 604 of the Lanham Act (64 Stat. 48, 64) and Executive Order 10339 (17 F. R. 3012), extending the date, the Public Housing Administration is required to remove, by demolition or otherwise, all dwelling structures comprising this temporary housing project as soon as practicable after July 1, 1954. It was to accomplish the congressional mandate that the Public Housing Administration entered into the contract involved in this suit. The Government did not invoke the remedy of an action at law since recovery of damages would not comply with the direction of Congress that the buildings be removed. Also, the Government had been obliged to expend money to renew its use and occupancy of the land for an additional year, and was facing the possibility (which did eventuate) of further renewals because of the failure of Century to complete its contract. Equitable relief was the appropriate answer and, accordingly, the Government filed the instant action.

The appellants' arguments completely overlook the nature of the litigation, the powers of a court to accord equitable relief, and their own position in this case. In defiance of the law and the public policy inherent in the Lanham Act and the contract which was

executed pursuant thereto, the appellants proceeded with their plan to convert into permanent housing what was temporary housing and to rent the houses at a profit.⁸ In the words of the district court with reference to the contract here involved (R. 75):

⁸The buildings here involved were constructed for temporary war housing (R. 63, 76). As indicated, Congress expressly directed that such housing be removed "by demolition or otherwise." Lanham Act. Secs. 313, 604, 54 Stat. 1125, as amended, 64 Stat. 48, 64, 72-73. The legislative history makes clear the policy of Congress to avoid any charge against the Federal Government that by leaving temporary housing projects around the country it created slums, presented personal injury hazards, depressed land values, etc. For example, in discussing the bill in which Sec. 313 was offered as an amendment, Mr. Sasser stated (89 Cong. Rec. 6888):

"* * * Some of this temporary housing, as many of us know, is located in sections where it is not particularly wanted, but the communities accepted it in furtherance of the war effort. It is substandard, not in keeping with surrounding properties; and if, after the war, it is not taken down, it will become more substandard, detrimental to values of surrounding properties, and in many instances might, as was the case after the last war, become ghost cities or possibly be sold to bargain-hunting private investors and rented as substandard properties out of keeping with the surrounding homes or carried on permanently as a Government-owned housing proposition which is contrary to the intent of the Congress. * * *"

See also: 89 Cong. Rec. 6873, 6886; 96 Cong. Rec. 3159, 3216; *Shanks Village Residents Association v. Cole*, 219 F. 2d 28, 30 (C. A. D. C. 1955), certiorari denied, 349 U. S. 906, where the Court stated with reference to this same statute: "Throughout consideration of the bill Congress evinced a strong purpose to eliminate this temporary housing and to get the Government out of the business of maintaining and renting it"; and *United States v. Certain Parcels of Land in Cheyenne*, 141 F. Supp. 300, 304 (D. Wyo. 1956), where the Court stated with reference to temporary housing: "* * * it was the announced policy of Congress with respect to such housing that it should be removed or otherwise disposed of as promptly as practicable and in the public interest, 42 U. S. C. A. secs. 1524, 1541, 1584 * * *."

the provisions of said contract, and all of them, and particularly those relating to removal of said buildings and site clearance, are clear, definite and unambiguous, and that said contract is fair, equal and just, not only in terms but in circumstances * * *.

All of the appellants had full and complete knowledge of the contract obligation that the buildings in question be removed from the site and that the parcels of land upon which they were located were held for the exclusive use of the United States (Fdgs. IV, XIII, XIV; R. 64-65, 71-72). Indeed, before acquiring their respective interests and "well knowing of the contract obligation of the Century Investment Corporation to remove said buildings from site" the appellants had endeavored to secure some express waiver of that contract obligation but were unsuccessful in such effort (Fdg. XV, R. 72-73).⁹

Also, despite the fact that it had been and was continuing to make conveyances of some of the buildings without imposing the required condition that they be removed from the site (Fdgs. X, XI; R. 60-70)—

⁹ There is every indication that under the instruments here involved (R. 10-20), title to the temporary buildings could not pass to the removal contractor [Century Investment Corporation] unless the temporary buildings were actually removed. In any event, in view of the concert of wrongful action on the part of the appellants, if there is any "reverter" in this case it should be to the Government. Cf. Barnett Br. 20-29. Under equitable principles, in the circumstances here disclosed by reaffirmed findings of the district court (Fdgs. IV, XIII, XIV, XV; Supp'l. Fdg. VII; R. 64-65, 71-73, 110) any interests "purportedly acquired" (Fdg. XI, R. 68-70) by the appellants should be held to have been in constructive trust for the United States. Cf. *Angle v. Chicago, St. Paul &c. Railway*, 151 U. S. 1, 24-27 (1894).

a matter which the district court expressly found to be "contrary to the spirit and plain meaning" of its contract with the Government—appellant Century Investment Corporation sought an extension of time for removal of the buildings (Fdg. IX, R. 67-68).¹⁰ These facts alone constitute misrepresentation by part of the appellants. And it appears that the misrepresentation was deliberate since the letter from Century requesting the extension of time stated, *inter alia*, "The Boiler rooms have been sold and the contractors are now tearing them down as fast at [*sic*] possible" (Pl. Exh. 9, *infra*, p. 41).

Based on the facts of this case, the district court determined that the appellants are not bona fide purchasers for value (Concl. X, R. 77-78). This conclusion is fundamental in the case. The appellants are seeking to retain their profits realized as the result of their own wrongdoing. The district court, in the exercise of its equity powers, properly did not permit them to do so since "The rule of equity is very broad to prevent a fraud, which would exist if one was permitted 'to derive a benefit from his own breach of duty and obligation.' 2 Story Eq. Jur. Sec. 781. * * *" *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185, 223-224 (1846). And "it is

¹⁰ While the Housing Authority of the City of Seattle had knowledge that buildings 102 and 103 were being offered for rental, on site, the Public Housing Administration did not. All of the appellants who dealt with the Housing Authority of the City of Seattle "knew, and now knows, that said organization is and was a wholly different organization from that of the Public Housing Administration of the United States of America" (Fdg. VIII, R. 67). (The limited role of the Seattle Housing Authority in this matter has already been noted, *supra*, pp. 6-7, fn. 5.)

contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure, by its wrongful acts." *Angle v. Chicago, St. Paul &c. Railway*, 151 U. S. 1, 25 (1894).

It is, of course, a long accepted maxim that where there is a wrong there is a remedy. The appellants Century and Pague contrived a scheme to circumvent a statutory requirement which was expressly designed for the safety and well-being of the public (fn. 8, *supra*, p. 15) despite the fact that it necessitated the breach of a contractual obligation by them to do so. As shown (*supra*, p. 16) the other appellants all had "full and complete" knowledge of the obligation and so knowingly participated in the scheme. Thus there were clearly "wrongs" by the appellants in the instant case. The remedy accorded by the district court in the exercise of its equity powers should not be disturbed.

Before leaving this point it should be noted that some of the appellants (Barnett, Owens, Ester and their wives) acknowledge that the judgment is good against other of the appellants, i. e., Virgil J. Pague and Century Investment Corporation (Barnett Br. 38. Cf. Barnett Br. 16). However, the former group of appellants seeks to escape any liability. Thus they argue, *inter alia*, "It is not alleged, and it is not proved, that Barnett, Owens and Ester are parties to the contract for a breach of which damages are assessed. No other theory of liability is alleged or proved" (Barnett Br. 37-38). Earlier they had similarly alleged (*ibid.*, p. 28): "Nowhere in the Find-

ings is a determination made that Barnett, Owens and Ester were parties to the contract upon which this action is based.”¹¹ But, this case is not a legal action for breach of contract. Rather it is a proceeding seeking equitable relief. And, contrary to the impression sought to be given by them, the Findings expressly state that these appellants had “full and complete” knowledge of the violation of the Government’s rights (R. 71-73). As the district court held (R. 77-78), these appellants are not “innocent purchasers.” With full knowledge they voluntarily joined Century and Pague in violating property rights of the United States arising from contract which was made pursuant to the express direction of Congress.

In these circumstances the district court properly held all of the appellants responsible in damages to the United States. In the exercise of equitable powers courts “are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.”¹² *Keystone Co. v. Excavator Co.*, 290 U. S. 240, 245-246 (1933). Though it did not ultimately decree the specific performance sought by the Government, in the exercise of its equity powers the district court did properly prevent the appellants from unjustly enriching themselves and receiving

¹¹ A similar allegation is also contained in their specifications of errors, *ibid.*, p. 4.

¹² This also serves to dispose of the contention that the court was bound to base damages on expenses incurred by the Government as a result of failure by the purchaser to abide by the terms of the contract (Century Br. 13). For the complete answer to the contentions concerning the “Contracting Officer” paragraph in which this expense formula appears, see *infra*, pp. 23-26.

windfalls through their own wrongdoing in knowingly violating rights of the Government. The appellants would have this Court upset that equitable result. But, as shown herein, there is no warrant for doing so and, additionally, federal courts have long refused to be made an “abettor of iniquity” (*ibid.*, at p. 245). Moreover, the wrong of appellants and the consequent right of the United States to some remedy is clear. If it should be determined that the remedy now given by the district court, i. e., damages, is inappropriate, it would follow that the only other available remedy, i. e., compulsory removal, should be decreed for this statutory and contractual violation.¹³

II. The damages awarded in lieu of specific performance were not excessive

Under the direction of the district court, a Special Master appointed by it made a complete accounting of all revenues received from and current operating expenses incidental to the commercial use by appellants of the property involved to determine the monetary damages sustained by the appellee. Rather than being prejudicial to the interests of the appellants, the damages awarded by the district court based on the findings of the Special Master are particularly favorable to them. This is so since items for which the defendants below (appellants herein) were prop-

¹³ The United States did not ask the court to re-examine the question whether the federal district court in the locality involved erred in determining that the remedy of damages was more appropriate under all the circumstances. Appellants having brought the matter before this Court, the lack of an appeal by the United States should not preclude the granting of whichever remedy this Court might deem appropriate.

erly liable in damages to the United States were not charged against them. Thus, there is not included in the damages any sum which represents the value of the interest of the Government in the buildings, any profits received subsequent to November 16, 1955, any sum to reimburse the Government for its deposits for annual rentals arising solely because of the continued use by the Government of the underlying land necessitated by the willful failure of the appellants to remove the buildings, or any sum which represents the Government's obligation to pay to the owners real estate taxes on the underlying land.

The latter two obligations arise under Civil 1143, the condemnation proceedings in the same district court. See *supra*, pp. 9-10. And, incidentally, these expenses alone, which were caused solely by appellants' wrongdoing, disprove appellants' allegation that there was no proof "that any actual damage was suffered or expense incurred as a result of the breach of contract in this case, or as the result of the occupancy of the property to which the government claimed a leasehold by the defendants" (Century Br. 16). Moreover, as discussed *infra*, p. 22, since the appellants did not see fit to bring up all of the evidence adduced below, they are not in a position to allege a failure of proof. And, it is, of course, readily apparent that the United States would have received far higher bids for the buildings involved if the contract which it offered had not required removal from site. It has been estimated that absent the removal requirement bids would have been at least five times as much for any building and this is necessarily so

since bids based upon removal would represent little more than salvage value.

Further, since the necessity for incurring the Master's fee was entirely due to the wrongdoing of the appellants, the full cost of that expense should have been charged to them as defendants below rather than one quarter being taxed against the United States. Inasmuch as this is an equity action and the amounts adjudged rather than being unfair to the appellants are in fact favorable to them, the judgment should not be disturbed.

III. The findings by the District Court which are challenged by the appellants are not clearly erroneous and so should not be disturbed on appeal

Appellants attack the court's findings as to the amounts of monetary damage but do so without having designated or brought before this Court all of the evidence in the case. At the trial of this case, as noted by the court below, witnesses were sworn, testimony taken, and evidence adduced (R. 115). And, as discussed in Point II (*supra*, p. 20), a Special Master appointed by the district court made a complete accounting in this case. Upon that basis the amounts of the awards were determined. Objections to the reports of the Special Master (R. 91-105) were not sustained and the work of the Special Master was approved and confirmed by the District Court (R. 107, 115, 119). A motion to alter or amend the judgment and decree of the district court (R. 118) was denied (R. 119). It is submitted that in these circumstances an appellate court should not hold findings of a trial court so "clearly erroneous" as

to warrant reversal. Rule 52 (a), Federal Rules of Civil Procedure.

Some of the arguments by the various appellants have already been answered in the preceding points. And, we have shown in Point I, *supra*, pp. 13-20, that in general appellants' contentions must fall when the equitable nature of the case and appellants' position in the litigation are considered. We will now show briefly the fallacies and want of merit in other specific arguments advanced by the appellants.¹⁴

A. *The attempt to support error on the lack of a determination of damages by the Government's Contracting Officer is obviously fallacious.*—The provision referred to by appellants Century Investment Corporation and Virgil J. Pague (Century Br. 10, 11, 12-16) on its face is a provision binding on the Purchaser [Century Investment Corporation or its alter ego, Virgil J. Pague] (R. 13-14). It does not purport to be a limitation on the Government.¹⁵

¹⁴ Insofar as appellants attack the amount of the fee allowed the Special Master (Barnett Br. 44-45), that is a matter primarily between them and the Master. Any possible change in that portion of the judgment should not in any event affect the other amounts awarded against the appellants.

¹⁵ It strikes us as strange that appellants would be urging the exercise of the provision for determination of damages by the contracting officer since such a determination would be binding upon them. *United States v. Wunderlich*, 342 U. S. 98, 100 (1951); *Reed v. Murphy*, 232 F. 2d 668, 672 (C. A. 5, 1956); *United States v. United Enterprises*, 226 F. 2d 359, 363 (C. A. 5, 1955). While the scope of the *Wunderlich* decision was limited by statute, the limitation went only to a determination which was "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." Act of May 11, 1954, 68 Stat. 81, 41 U. S. C. sec. 321. Any other factual determination, such as the amount of damages

Though it is submitted that what has just been said disposes of this argument, the circumstances of this case made it particularly appropriate for the Government to rely on the court to determine the damages. As has been shown (in. 8, *supra*, p. 15), federal officials are under a mandatory congressional requirement to remove buildings such as here involved. Accordingly, the Government sought primarily to have that requirement enforced rather than to recover damages. Also, the Government did not undertake to exercise the "self-help" provision (Par. 6 of General Conditions, R. 16), i. e., to remove the buildings and charge the cost of such removal to the purchaser, because misrepresentations and acts by the appellant Century Investment Corporation brought about a situation where such action was inadvisable.¹⁶

occasioned by a failure to comply with the terms of a contract, made under a provision of a contract entered into by the United States is "final and conclusive." *Ibid.*

¹⁶ As some of the appellants recognize, the Century Investment Corporation was, in substance, Virgil J. Pague, its promoter. Thus, they state (Barnett Br. 16) :

"Findings of Fact III, IV and V (R. 64-65) conclusively show that A. E. Sherman was the alter ego of Virgil J. Pague. Consequently, for all damages which may be due plaintiff, Century Investment Corporation, A. E. Sherman and his alter ego, Virgil J. Pague, are solely liable as parties to the contract. As a matter of fact, since it clearly appears by paragraph VI of the findings (R. 66) that there was no such "person" as the Century Investment Corporation at the time the assignment was made to it by A. E. Sherman, this would mean that the original party liable on the contract was Virgil J. Pague, as the principal of A. E. Sherman."

In the light of the above statement and, particularly, finding of fact IV, R. 64-65, compare the allegation in the other brief for the appellants that "Defendan Pague in this case was not a party to the contract, and so any damages against him must have been

Thus, in violation of its contractual obligations, Century had purported to convey to the remaining appellants and others interests in the building here involved. (See *supra*, pp. 4-5, for factual details.) And, on the grounds that such time was necessary "so that we may complete our cleaning the grounds and finish removing the houses that have been sold" (Pl. Exh. 9, *infra*, p. 41), Century prevailed upon the Seattle Housing Authority to purport to authorize an extension of time for performance under the contract. While federal officials believed, and the Court ultimately found (Fdg. VIII; Concl. V; R. 67, 75), that the limited authority granted to the Seattle Housing Authority was not broad enough to authorize it to waive any of the terms and conditions of the contract, a cloudy legal situation had thus been raised and the rights of third parties who were claiming to be bona fide purchasers had become involved. It was not until the trial that it was proved that these parties, including the non-corporate appellants herein, were not "innocent purchasers" (R. 77-78). In these circumstances, the Government's reliance upon the courts rather than self-determination was clearly appropriate.

Moreover, the record does not indicate that this contention was ever raised in any of the proceedings below. Obviously, if it had been, a simple answer would have been for the government agent to make the determination which would, in all probability, have exceeded the amount of the judgment by in-

based upon a trespass or unauthorized use of government property" (Century Br. 19).

clusion of items which might have been awarded (*supra*, pp. 20–21). Appellants should not, we submit, be entitled to seek a reversal upon an alleged error which could have been so easily cured had it been raised below.

B. *Appellants' argument that the court erred in ordering an accounting (Century Br. 18–33) and their challenge of the Special Master's work (Century Br. 39–44) contain many fallacies and do not warrant reversal of the judgment entered by the district court.*—As outlined in the Statement of Facts (*supra*, pp. 8–9), in this equity proceeding the Court itself desired further information concerning the question of damages. It determined that since there was evidence that appellants made commercial use of the buildings, and such use was carried on by the appellants from the sites from which they were obligated to remove the buildings during the period complained of, an accounting was in order (Oral Decision, *infra*, pp. 39–40). As has been pointed out (*supra*, p. 19) by quoting from the Supreme Court, courts of equity “are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.” *Keystone Co. v. Excavator Co.*, 290 U. S. 240, 245–246 (1933). Indeed, the ordering of an accounting is a common tool employed by courts of equity.

The appellants' argument that the transaction concerning the buildings was “one of sale” (Century Br. 21) gets them nowhere. (In this connection see fn. 9, *supra*, p. 16.) In addition to the fact that “the offsite removal was an incident” of the trans-

action as there admitted (*ibid.*), the contract involved went only to the buildings and did not involve the underlying lands for which the Government had the exclusive use through June 30, 1956. Appellants' attempts to confuse that issue must also fail. The President by Proclamation 2974 of April 28, 1952, 66 Stat. C31, C32, and Congress in the Act of July 3, 1952, 66 Stat. 330, 332, continued until April 1, 1953, the emergency declared by the President on September 8, 1939, for the purpose of continuing the use of property held by the Government under the Lanham Act, 54 Stat. 1125, as amended, 42 U. S. C. 1521 *et seq.* July 1, 1953, was substituted for April 1, 1953, by the Act of March 31, 1953, 67 Stat. 18. Three years after July 1, 1953, is July 1, 1956.¹⁷

And it is too late in the day for any credence to be placed in appellants' reliance upon the Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449, as terminating the national emergency here involved for the purposes of this case (Century Br. 27, 28, 32). The Supreme Court, this Court, and other courts have repeatedly rejected that contention. *Woods v. Miller Co.*, 333 U. S. 138, 140, fn. 3 (1948) (noting that, on the very occasion of his approval of the 1947 Joint Resolution, the President said: "The emergencies de-

¹⁷ By appropriate notices filed in the condemnation proceedings (*United States v. Certain Parcels of Land in King County, Washington, et al.*, Civil No. 1143, United States District Court for the Western District of Washington, Northern Division), the temporary use of the United States in the underlying lands was terminated as of June 30, 1956. See *infra*, p. 40 where the District Court expressly found that the emergency involved existed "at all times material to this action".

clared by the President on September 8, 1939, and May 27, 1941, and the state of war continue to exist, however, and it is not possible at this time to provide for terminating all war and emergency power''); *Werner v. United States*, 233 F. 2d 52, 54-55 (C. A. 9, 1956), certiorari denied, 352 U. S. 842¹⁸; *United States v. Certain Parcels of Land in Potter Tp.*, 102 F. Supp. 691, 695 (W. D. Pa. 1952) (rejecting the proposition appellants assert here with the sufficient answer that in the Joint Resolution of July 25, 1947, Congress "was not terminating the national emergency as defined in leases or condemnation petitions by which the land on which the projects were located were acquired * * *").

¹⁸ As this Court and counsel for the Government have particular occasion to know, the *Werner* case, *supra*, cited Century Br. 32, affords no comfort to the appellants here. That case did not involve the express exception contained in Presidential Proclamation 2974 of April 28, 1952, 66 Stat. C31, which provides for the continuing use of property held under the Lanham Act. The proclamation specifically provided (66 Stat. C32) :

"* * * and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act, approved April 14, 1952 (Public Law 313—82d Congress), for the purpose of continuing the use of property held under the Act of October 14, 1940, ch. 862, 54 Stat. 1125, as amended [the Lanham Act]." Thus the "existing national emergency" (Century Br. 26), i. e., the emergency declared September 8, 1939, was expressly proclaimed to be in continuation for the purposes presently involved. As acknowledged by appellants (Century Br. 26) under judgments entered in the condemnation proceedings the Government's tenure was extendible for three years after the termination of the existing national emergency. As shown in the text above, the date of such termination was July 1, 1953, and three years thereafter was July 1, 1956. Thus no constitutional problem arises since Congress did not pass an act taking property beyond the tenure fixed by the court. Cf. Century Br. 30.

In this connection the appellants refer to their tenure in the street area after December 9, 1953 (Century Br. 23). Since this is an equity proceeding (R. 74), it should be noted that the appellants secured their interests in the streets as part of their scheme knowingly to violate the statutory and contractual obligation to remove the temporary housing here involved. This is amply reflected by Finding XV, R. 73. Thus "before acquiring their respective interest and well knowing of the contract obligation of Century Investment Corporation to remove said buildings from site and well knowing that the exclusive use of the substantial portion of the land underlying said buildings was held for the exclusive use of the plaintiff [United States]," the appellants endeavored to secure some express waiver of the obligation to remove the buildings (Fdg. XV, R. 73). They were unsuccessful. Then, after purporting to acquire their respective interests "and in an effort to secure" the express waiver of the contract obligation, the appellants secured permission of the City of Seattle to remain on the site and action of the Seattle Board of Public Works granting them the use of the street area (*ibid.*; see also Oral Decision, *infra*, p. 38).

Certainly the fact that, being unable to secure the waiver from anyone connected with housing matters, the appellants had prevailed upon the Seattle Board of Public Works to grant them use of the street area adjacent to the land underlying the buildings, which land had purportedly been conveyed to them in furtherance of their plan (see also Fdgs. XI, XII; R. 68-71), gives no support to appellants' allegation

that the court erred in ordering an accounting in this equity proceeding.

Similarly, the fact that appellants had acquired interests in the underlying lands accords no support. Cf. Century Br. 23; Barnett Br. 19-29, 32-38. As the record makes clear "none of the defendants [appellants] herein possessed an interest in said lands at the commencement of said [condemnation] proceedings, they having acquired their respective interests after the date of the contract sued upon in this action" (Fdg. XII, R. 70-71) and they "purportedly acquired" (Fdg. XI, R. 68-70) their interests with "full and complete knowledge" of the obligation to remove the buildings (Fdgs. XIII, XIV; R. 71-72).

Not only do appellants challenge the propriety of the district court's order of an accounting but some of the appellants urge at length that this Court review the reports of the Special Master (Barnett Br. 39-44). But since hearings were had and evidence was adduced before the Special Master, including sworn statements by certified public accountants (see, e. g., first page of Supplemental Report of Special Master forwarded to this Court as item 107 in the Certificate of the Clerk of the District Court (R. 133)) the findings of the Special Master were supported by substantial evidence. And the findings of a master confirmed by the district court will not be disturbed when based on evidence. *Stonesifer v. Swanson*, 146 F. 2d 671, 672 (C. A. 7, 1945), certiorari denied, 325 U. S. 880, rehearing denied, 326 U. S. 805. There the Court stated:

This is not a trial de novo. The respect which we entertain for findings made by the

trier of facts, who has had the opportunity of seeing and hearing the parties, makes it impossible for us to disturb the findings here made.¹⁹

Indeed, the well-nigh conclusive nature of concurrent findings of a special master and the court has frequently been stated. See, e. g., *Cooper v. Brown*, 126 F. 2d 874, 879 (C. A. 3, 1942); *Frank Adam Electric Co. v. Colt Patent Fire A. Mfg. Co.*, 148 F. 2d 497, 499 (C. A. 8, 1945); *Parker v. United States*, 126 F. 2d 370, 376 (C. A. 1, 1942); cf. *Prentice v. Boteler*, 141 F. 2d 175, 176 (C. A. 9, 1944); *Boyce v. Chemical Plastics*, 175 F. 2d 839, 841 (C. A. 8, 1949), certiorari denied, 338 U. S. 828. In *Cooper v. Brown*, *supra*, which involved an accounting situation, the court stated (126 F. 2d at p. 879):

The master and the trial court having concurred upon conflicting evidence in the finding of fact with respect to the income received by the defendant, confirmation of the finding by

¹⁹ Similarly, the Court stated in *Westchester County Park Commission v. United States*, 143 F. 2d 688, 695 (C. A. 2, 1944), certiorari denied, 323 U. S. 726: "Nothing is left to this appeal but, in effect, a request to us to conduct a trial de novo. This we cannot do. The trial court's determination of the facts must stand unless it is unsupported by substantial evidence (citing authorities in footnote). We see no warrant for reversal on that score." And in *Seagram-Distillers Corp. v. New Cut Rate Liquors*, 221 F. 2d 815, 820 (C. A. 7, 1955), the Court stated: "We are not permitted to substitute our opinion for the finding of the district court where, as here, the record furnishes a reasonable basis for its findings and action." Other cases have made clear that "It is not the function of an appellate court to assume the powers of the trial court" or to try the case *de novo*. *Schilling v. Schwitzer-Cummins Co.*, 142 F. 2d 82, 83 (C. A. D. C. 1944); *Empire District Electric Co. v. Rupert*, 199 F. 2d 941, 945 (C. A. 8, 1952), certiorari denied, 345 U. S. 909; *Ralston Purina Co. v. Novak*, 111 F. 2d 631, 634 (C. A. 8, 1940).

an appellate court necessarily ensues. *In re Ackerman*, 2 Cir., 297 F. 224; *Wootton Land & Fuel Co. v. Owenbey*, 8 Cir., 265 F. 91, 97.

C. *The district court's supplemental findings and conclusions do not require a reversal of the judgment which it entered.*—The appellants argue (Barnett Br. 9-29; Century Br. 23-25) that the judgment is not supported by the findings and conclusions of the district court. The asserted ground is that the United States lost its tenure in the lands underlying the buildings because of alleged failure to pay the compensation prescribed in the condemnation proceedings.²⁰ There are simple answers to any such contention. First, even if the United States had no adjudicated right to the land, it could not be ousted from its possession and use. The only remedy of anyone having interests in the property would be a suit under the so-called Tucker Act.²¹ Second, this

²⁰ Rentals had regularly been paid or deposited in the registry of the court. The only thing upon which appellants base this argument is the tax situation discussed *supra*, pp. 9-10, and as to that matter administrative procedures had been established to pay the taxes in an orderly manner as they were lawfully levied and assessed.

²¹ It is established law that the Government may "take" property in the exercise of the power of eminent domain without formal condemnation proceedings being filed, and that in such event the landowner's remedy is a suit under the so-called Tucker Act on the theory of implied contract, the recovery being the same as though a condemnation proceedings had been filed. *Campbell v. United States*, 266 U. S. 368, 370-371 (1924); *Hurley v. Kincaid*, 285 U. S. 95, 103-105 (1932); *Yearsley v. Ross Constr. Co.*, 309 U. S. 18, 21-23 (1940); *Causby v. United States*, 328 U. S. 256, 267 (1946). And such possession may be taken even when the court has refused in condemnation proceedings to enter an order of possession. *United States v. Merchants Transfer & Storage Co.*, 144 F. 2d 324 (C. A. 9, 1944).

argument by the appellants fails since it is but a collateral attack on the condemnation proceedings, an entirely separate action. Third, and more important, the district court did not here purport to hold that the United States had lost its tenure in the land. In the condemnation proceeding itself—which would be the only appropriate place for such an order—the court did not at any time rule that the Government's estate terminated earlier than June 30, 1956, by virtue of any failure to deposit in advance funds to cover taxes as they were lawfully levied and assessed or for any other reason.²² Nor did the court so rule in the instant case. Rather, for reasons which will be explained hereinafter, the district court simply found that because of a failure to prove that “the future ascertainable installments” of just compensation had been paid, it would not accord to the Government the requested order that the defendants be specifically compelled to remove the buildings and clear the sites (Supp'l Fdg. II, R. 108). It was by no means a finding that the Government's tenure had been lost or that the Government was not entitled to relief for the wrongs committed against it by the appellants.

The district court was faced with a difficult factual situation. The appellants had knowingly violated rights of the Government and it was clearly entitled to a remedy. However, the fact remained that—while it had been done in spite of the removal requirement—the buildings had been improved, the United States was about ready to terminate its temporary use, the

²² The termination as of June 30, 1956, was by appropriate notices filed by the Government in the condemnation proceeding.

City Council of Seattle had approved use of the buildings on site for rental purposes for five years from October 1, 1953 (R. 53), and the effect on tenants and the local community was to be considered. In the exercise of its equity powers the district court determined that it would be more practical to award damages than to require removal of the buildings (see Supp'l Fd'g. III, R. 108-109).

It is submitted that the result reached by the district court is more than fair to the *appellants*. They should have been required to remove the buildings in accordance with the law and contractual obligations. For reasons heretofore explained, the Government has not prosecuted an appeal in this case. But, in the exercise of its equity powers, should this Court take any action other than affirmance of the judgment below, it should be to require removal of the buildings in compliance with the mandate of Congress and the contractual obligations undertaken in this case.

D. The argument by appellants Barnett, Owens and Ester (Barnett Br. 29-38) that the district court erred in denying dismissal as to them is clearly without merit.—As noted by these appellants (Barnett Br. 29), the district court denied motions alleging a failure to state and to prove a claim against them. Those motions were properly denied. In this respect, as in others, appellants ignore the nature of the case. It is not an action at law for a breach of contract as they would have it appear. Rather, as the court below makes clear (R. 74), it is an equitable proceeding by the United States seeking remedy for "open and flagrant" (R. 7) violation by the appellants of

rights of the United States, statutory and contractual. As shown by the findings, *all* of the appellants knowingly violated these rights of the Government with "full and complete" knowledge of them (Fdgs. XII, XIV, XV; R. 71-73). As also there shown, they not only knew of the requirement for removal of the buildings but they contrived an elaborate plan to circumvent the requirement. See also *infra*, page 38. The powers of equity are great. See cases cited *supra*, pp. 17-18. Appellants Barnett, Owens and Ester were joint actors with appellants Century Investment Corporation and Virgil J. Pague in the violation of the Government's rights. They were made parties to this equitable action and the district court properly declined to dismiss them.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

CHARLES P. MORIARTY,
*United States Attorney,
Seattle, Washington.*

JOHN A. ROBERTS, Jr.,
*Assistant United States Attorney,
Seattle, Washington.*

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,

Department of Justice, Washington, D. C.

JANUARY 1957.

APPENDIX

ORAL DECISION

This matter having come on for hearing before the Honorable John C. Bowen, Judge of the above-entitled Court, on Wednesday, September 7, 1955 at 2:00 P. M., plaintiff, the United States of America, represented by its counsel, John A. Roberts, Jr., defendant appearing by counsel Lyle Iverson for Century Investment Corporation and Virgil and Carl Pague, Gerald Shucklin for Geneva L. Pague, Malcolm McLeod for Hartford Accident and Indemnity and A. E. Sherman, Alex Duff and Arthur G. Barnett for defendants Owens and Barnett, Morris A. Robbins for Ester, all parties having been heard and all parties having rested, the Court, being fully advised on the premises, thereupon rendered the following:

ORAL DECISION

The COURT. From the preponderance of the evidence in this case the Court finds, concludes and decides that although the plaintiff did give to Mr. Michaelson, an employee of the Seattle Housing Authority, a limited, specially appointed agency and authority to do certain specified things in connection with the letting of the contract which resulted in the purchase and sale by the defendants Pague and Century Investment Corporation, there never was any general agency from the plaintiff to Mr. Michaelson with powers broad enough to generally authorize Mr. Michaelson to waive any of the terms and conditions of the contract of purchase and sale referred to between the plaintiff's agencies and the defendants Pague and Century In-

vestment Corporation. By the use of the term or phrase "defendants Pague and Century Investment Corporation" I mean, in particular, Century Investment Corporation—at the time the contract was entered into. Pague was one of the moving spirits whose activities, in part, were looking forward, at that time, to the incorporation of the defendant Century Investment Corporation.

That incorporation was later accomplished, and the acts of Pague and Sherman in behalf of the Century Investment Corporation, Inc., to be later formed, were authorized by Century Investment Corporation later. That corporation became connected with the purchase and sale here in question. More particularly, it became interested in all of the acts and things done by Mr. Pague and Mr. Sherman respecting these buildings, and became bound on this contract of purchase and sale;

That by their acts and deeds complained of in this action, and particularly, by not removing the buildings here in question from the site on which they were used by plaintiff or its Public Housing Administration, and as alleged in all of the things done and omitted by the defendants in connection with failure to remove the buildings, as required by the contract, the defendants breached the terms of the alleged contract, and plaintiff is entitled to have specific performance of it because of the extreme importance of the conditions and objects of the contract, all of which necessitate that the buildings be removed and that the contract be otherwise performed.

The Court further so finds, concludes and decides that defendants' failure to comply with the contract and remove the buildings constitutes an irreparable injury, because it enabled the defendants, and each and all of them, to operate the buildings in question

on the site where they were first constructed as commercial buildings, as rental housing units, and for other commercial purposes, as to which the plaintiff was, and still is, without an adequate remedy at law to obtain redress for such breaches of the contract of purchase and sale;

That the defendants, other than Pague and Century Investment Corporation, are liable to the plaintiff in this action, and against them the plaintiff is entitled to the same relief as the Court has just announced the plaintiff is entitled to against the defendants, Pague and Century Investment Corporation, because the other defendants other than Century Investment Corporation and Pague, acquired no better title to anything than that which the defendant, Century Investment Corporation and the defendant Pague, themselves had; that they actually knew, so the Court finds from the preponderance of the evidence in this case, before they acquired their presently asserted interests, of the limitation of right of the purchaser of the buildings and that the buildings were to be removed from the property. That, of course, is unmistakably manifested by the actions taken by these defendants purporting to purchase from the defendants Pague and Century Investment Corporation, in their taking steps to obtain a resolution from the City Council and in discussing the conditions involved with Mr. Michaelson, and trying to get, through him, some express waiver of this contract obligation, requiring the purchaser to remove the buildings from the site where they were when the contract was entered into.

From the preponderance of the evidence the Court finds, concludes and decides that, as to the defendant Hartford Accident and Indemnity Company, its suretyship liability on the performance contract was ended when the time of contract performance was

extended by plaintiff without the consent and approval of the surety Hartford Accident and Indemnity Company; that such time extension was a material increase by plaintiff of the risk assumed by the defendant surety, and it was a material breach of the terms and the conditions of the contract;

That defendant is not liable for the further reason that the obligee under the bond was neither the plaintiff nor any agency of plaintiff, but was "Housing Authority, City of Seattle", and everybody connected with this case at the time that contract was made knew, and now knows, that that was a wholly different organization or agency from that of the Federal Public Housing Administration in whose behalf plaintiff maintains this action. There is no evidence of valid substitution of such Public Housing Administration or of the plaintiff as obligee in the bond.

Now, the Court wishes to refer to the issue tendered by plaintiff of an accounting. The Court does not feel that there is sufficient evidence adduced which would support the findings or decision one way or another on the question of whether or not, and if so, how much money, the plaintiff has been damaged up to this time in terms of dollars and cents, and I do not see how the Court could be fully and adequately advised of the amount of such damages unless the Court knew from proper evidence what the value of the use of the property has been during the time of the breach by the defendants of their obligation to remove these buildings, and a very substantial informative source of information would be the amount of money realized by these defendants in the conduct of commercial businesses in these housing units, while they were using them;

And so the Court finds, concludes and decides from the preponderance of the evidence, that since there

is evidence that such commercial use of the buildings was made by the defendants, and such commercial business was carried on by the defendants on the site from which they were obligated to remove the buildings during the period complained of, the plaintiff is entitled to a full and complete accounting of all the monies received and all expenses paid on account of any and all such commercial businesses so conducted by the defendants. The Court indulges the hope that plaintiff and defendants can agree upon the proper and necessary details of effecting that accounting so as to minimize, as far as possible, the expenses thereof, and also, the Court will hope that counsel can agree upon the time in which such accounting may be effected; also, the Court wishes counsel to further consider among themselves and recommend to the Court in future trial proceedings not later than the time to be appointed for the settling and entering of proper findings of fact, conclusions of law and decree, the time within which the Court should order the accomplishing of specific performance as to the removal of the buildings, the Court finding that at all times material to this action there existed the emergency during which, under paragraph number 3 in the judgment fixing compensation and directing funds to be paid in cause number 1143, the plaintiff had the right, under the decree, to renew the estate taken from year to year, and that plaintiff had such right by reason of the terms and provisions, particularly of joint resolution, being Public Law 450, Chapter 570, Act of July 3, 1952, set out in 66 Stat. 330, and also by virtue of the provisions of the joint resolution, being Public Law 12, Chapter 13, Act of March 31, 1953, 67 Stat. 18.

CERTIFICATE

I, Madeline Newell, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

(S) Madeline Newell,
MADELINE NEWELL,
Official Court Reporter.

Nov. 2, 1953.

Mr. CHARLES W. ROSS,
Seattle Housing Authority,
825 Yesler, Seattle, Wash.

DEAR MR. ROSS: In regard to our telephone conversation of this date would you please consider granting us an extension of 60 days, so that we may complete our cleaning the grounds and finish removing the houses that have been sold.

The house movers have been very busy this summer and have been unable to deliver the houses as fast as we sell them. The Boiler rooms have also been sold and the contractors are now tearing them down as fast at [*sic*] possible.

Hoping you will grant this extension, I am,
Yours very truly,

CENTURY INVESTMENT CORP.,
(Signed) A. E. Sherman,
By A. E. SHERMAN.

[Plaintiff's Exhibit 9]

NOVEMBER 12, 1953.

Mr. A. E. SHERMAN FOR THE
CENTURY INVESTMENT Co.,
914 Dearborn Street,
Seattle 4, Washington.

DEAR MR. SHERMAN: Your request for an extension of time in which to complete your contract for the removal of buildings and for site clearance at WASH-45302 is approved not to exceed January 15, 1954.

Please be advised that because of the many requests from owners for the release of their properties, no extensions beyond this date will be possible.

We ask that you submit a report to us on December 15th, showing progress made and work still required for completion.

Sincerely yours,

J. R. ADAMS,
Acting Executive Director.

JRA: LM: dlc
cc to Virgil J. Pague

[Plaintiff's Exhibit 10]

No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**REPLY BRIEF of Joint Appellants Barnett, Owens
and Ester**
**Appeals from the United States District Court for the
Western District of Washington,
Northern Division.**

VERNON W. TOWNE,
ARTHUR G. BARNETT,
ALEC DUFF,

*Attorneys for Barnett,
Owens and Ester*

1304 Northern Life Tower
Seattle 1, Wash

FILE

FEB 25 1957

No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**REPLY BRIEF of Joint Appellants Barnett, Owens
and Ester**

**Appeals from the United States District Court for the
Western District of Washington,
Northern Division.**

VERNON W. TOWNE,
ARTHUR G. BARNETT,
ALEC DUFF,

*Attorneys for Barnett,
Owens and Ester*
1304 Northern Life Tower
Seattle 1, Wash.

INDEX

	<i>Page</i>
Introduction.....	1
Answer to Appellee's Arguments.....	7
I. First argument.....	7
II. Second argument.....	11
III. Third argument.....	13
A.....	14
B.....	14
C.....	22
D.....	27
Conclusion.....	27

TABLE OF CASES

<i>Angle v. Chicago, St. Paul &c. Railway</i> , 151 U.S. 1	9
<i>Boyce, v. Chemical Plastics</i> , 175 F. 2d 839,	
certiorari denied, 338, U.S. 828	21
<i>Campbell v. United States</i> , 266 U.S. 368	23
<i>Carpenter v. Providence Washington Ins. Co.</i> ,	
4 How. 18	9
<i>Causby v. United States</i> , 328 U.S. 256	23
<i>Cooper v. Brown</i> , 126 F. 2d 874	21
<i>Empire District Electric Co. v. Rupert</i> ,	
199 F. 2d 941, certiorari denied 345 U.S. 909	20
<i>Frank Adam Electric Co. v. Colt Patent</i>	
<i>Fire A. Mfg. Co.</i> , 148 F. 2d 497	20
<i>Hurley v. Kincaid</i> , 285 U.S. 95	23
<i>Keystone Co. v. Excavator Co.</i> , 290 U.S. 240	10
<i>Mayo v. United States</i> , 309 U.S. 310	19
<i>Parker v. United States</i> , 126 F. 2d 370	20
<i>Prentice v. Boteler</i> , 141 F. 2d 175	21
<i>Walston Purina Co. v. Novak</i> , 111 F. 2d 631	20
<i>Wagram-Distillers Corp. v. New Cut Rate</i>	
<i>Liquors</i> , 221 F. 2d 815	19
<i>Whilling v. Schwitzer-Cummins Co.</i> ,	
142 F. 2d 82	19

TABLE OF CASES (Cont.)

<i>Stonesifer v. Swanson</i> , 146 F. 2d 671, certiorari denied, 325 U.S. 880, rehearing denied 326 U.S. 805.....	18
<i>United States v. Certain Parcels, etc., Outer Harbor Dock & Wharf Co.</i> , 131 F. Supp. 65.....	18
<i>United States v. General Motors</i> , 323 U.S. 373, 376	16
<i>United States v. Hayman</i> , 115 F. 2d 599, 601.....	18
<i>United States v. Merchants Transfer & Storge Co.</i> , 114 F. 2d 324.....	23
<i>United States v. 16.747 acres</i> , 50 F. Supp. 389.....	17
<i>Westchester County Park Commission v. United States</i> , 143 F. 2d 688, certiorari denied, 323 U.S. 726.....	19
<i>Yearsley v. Ross Constr. Co.</i> , 309 U.S. 18.....	23
12 Am. Jur. 812, § 265.....	7
3 Pomeroy's Equity Jurisprudence (3rd ed.) 460, § 879.....	8

No. 15219

United States
Court of Appeals
for the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His
Wife; EDWARD R. ESTER and LORRAINE M. ESTER,
His Wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**REPLY BRIEF of Joint Appellants Barnett, Owens
and Ester**

**Appeals from the United States District Court for the
Western District of Washington,
Northern Division.**

INTRODUCTION

In their brief, Barnett, Owens and Ester, carefully summarized the complaint, and the findings, conclusions and judgment of the lower court, and demonstrated that the judgment against them was erroneous and that the

action as to them should be dismissed. Legally and factually their position differs from that of the other appellants before this court.

The complaint (R. 3-22) was bottomed on a breach of a contract providing for removal of certain temporary war housing, and asked for damages for that breach and for other relief. The judgment awarded damages for breach of the contract (R. 114-117). But the judgment erroneously treated appellants, Barnett, Owens and Ester, as though they were parties to the contract and liable for its breach.

The trial court found that, since the "plaintiff has not proved that the future ascertainable installments of such just compensation have been paid" (R. 108), it had not proved its right to exclusive possession to the real estate. This being true, Barnett, Owens and Ester, fee owners of the real estate underlying the buildings, became the owners of the improvements, under the law of the state of Washington and under Federal law. Not having paid the rent due under the condemnation judgment,¹ appellee's term ended, its option to renew lapsed, and the improvements reverted to the fee owners of the real estate.

The questions involved in this appeal are simple and will be answered in this brief.

¹The condemnation judgment (and amended judgments) is discussed in the Appendix A where the provisions for payment of just compensation, renewal of the term, and removal of improvements, are quoted.

1. Are fee owners of real estate liable in damages, based on an accounting of rents, from improvements on real estate which had reverted by operation of law to them?

2. Can it be said that mere knowledge of the terms of a contract providing for removal of buildings, serves as the basis for awarding damages against owners of property who are not parties to the contract?

3. In any event, did the Special Master correctly compute the rents received by the owners of the real estate, and was his fee excessive?

Before discussing the argument of appellee, it should be noted that appellee, in its brief (page 13), stated that it saw no need to burden this Court with two briefs. As a result, appellee, without distinguishing between the appellants Barnett, Owens and Ester and the appellants Century Investment Corporation and Virgil J. Pague, refers to "appellants" and uses the term "they" throughout the brief, casting a tremendous burden upon this Court and counsel, for factually and legally the positions of the two groups of appellants are as different as night from day.

Appellee also uses the terms "breach", "wrongdoing", "fraud", "windfall", and the like, apparently with the deliberate design to prejudice these appellants and influence the court. Nowhere in the findings of the trial court do such words as "fraud", "wrongdoing", "windfall" appear.

Referring to the breach of the contract for removal, appellee does not make clear that the contract was signed only by appellee and Century Investment Corporation and A. E. Sherman, alter ego of Virgil J. Pague (R. 64-67, Findings III-VII) on July 14, 1953; that the breach occurred on the date specified in the contract, i.e., on November 12, 1953 (R. 67, Finding IX); and that it was not until after those dates that appellant Barnett, Owens and Ester acquired their interests in the underlying real estate (R. 68, Finding XI).

Appellee states in its brief (page 17):

“These facts alone constitute misrepresentation by part of the appellants. And it appears that the misrepresentation was deliberate since the letter from Century requesting the extension of time stated. . . .”

But appellee does not make clear that the letter of Century was dated November 2, 1953, months before Barnett and Owens purchased the real estate and prior to the time Ester became owner of his real property.

On page 17 of its brief, appellee says:

“Based on the facts of this case, the district court determined that the appellants are not bona fide purchasers for value. (Concl. X, R. 77- 78)”

The trial court did not make that statement. The court did say that Barnet, Owens and Ester:

“ were not innocent purchasers of same without knowledge and notice of the contract. . . .” (R. 78).

Appellee states that "this conclusion [that Barnett, Owens and Ester are not innocent purchasers for value] is fundamental in the case" (Br. 17). Since there is no such conclusion, we must assume that again appellee seeks to prejudice these appellants and confuse the court. All the trial court ever held was that, when Barnett, Owens and Ester purchased, they had knowledge that the original contract of July 14, 1953 provided for removal of the buildings. But the court also found that appellee and its agents knew that certain of the buildings were being rented in the fall of 1953 (R. 67-68); that the purchase by Barnett and Owens on January 20, 1954 was partly from Scougal and Crowe, who had purchased in September, 1953, had not removed the buildings, and had then sold the land and resold the building 104 (R. 69); that the purchase by Ester was from another third party (R. 69); that the time for performance of the contract had expired (R. 67, Finding X); that the Seattle Board of Public Works on October 8, 1953, had cancelled the use of certain streets and alleys on the ground that the use of the property as temporary housing had been abandoned (R. 73, Finding XV); that the City of Seattle had permitted the buildings to remain on site for five years and that all of the buildings had been altered to comply with the code as permanent housing (R. 73).

The trial court did find, as appellee states (Br. 7), that the agent of the appellee (Michaelson) had in-

sufficient authority to vary the terms of the contract for removal (R. 75, Concl. V), but the trial court also found that the agent's knowledge that the property was being rented and that the extension granted by appellee's agents, was sufficient to discharge the surety (R. 77, Concl. IX). Why the agent's apparent authority was sufficient to discharge the surety but was not sufficient to deal with these appellants will always mystify Barnett, Owens and Ester, particularly because the Housing Authority of the City of Seattle was proud that buildings and units such as were involved in this case had been codified by the hundreds into homes and apartments (See Def's Ex. 6, containing photographs of numerous dwellings). Barnett, Owens and Ester surely could assume without being accused of fraud and wrongdoing that the buildings, on land owned by them, could be changed and codified from substandard temporary housing into standard dwellings, meeting the requirements of the City of Seattle. When that was done by these appellants, they were not, by some legerdemain, made parties to the contract sued upon.

Similar careless statements appear elsewhere (See Appendix B). The foregoing are sufficient to show that appellee's statements must be carefully analyzed, for this Court will not conclude, upon the basis of general and inaccurate accusations of wrongdoing and fraud, that Barnett, Owens and Ester were attempting to defraud their government. Such arguments are abhorrent

to the sense of justice and fair play with which Courts determine the rights of parties, be they the sovereign or the lowliest individual. We therefore turn to a discussion of the issues presented.

ANSWER TO APPELLEE'S ARGUMENTS

I.

Appellee's first argument (Br. 13) is that there was a clear breach of contract by Century such as would justify removal of the buildings or the award of damages; and that appellants Pague, Barnett, Owens and Ester had knowledge of and participated in those "breaches".

The short answer to that argument is that Barnett, Owens and Ester were not parties to the contract and cannot be held liable for its breach. (See authorities cited in appellants Barnett Br. 18-20). Appellee does not, and indeed cannot, dispute that proposition. Rather, appellee asserts that knowledge of the terms of the contract make Barnett, Owens and Ester liable for its breach. The law is clear:

"Parties to a contract cannot impose any obligation upon a stranger to the contract under its terms."

12 Am. Jur. 812, § 265.

Whatever may be the liability of the other appellants, Century Investment Corporation and Virgil J. Pague, the argument appellee makes in this portion of its brief has no validity as to Barnett, Owens and Ester.

Pursuing its argument, appellee quotes the old equitable maxims: "One is not permitted to derive a benefit from his own breach of duty and obligation"; "It is contrary to equity that a defendant should be permitted to enjoy unmolested property received by wrongful acts"; and, "Where there is a wrong, there is a remedy". We do not quarrel with this hornbook law. But, so far as Barnett, Owens and Ester are concerned, these maxims have no more validity than the assertion that mere knowledge of the terms of a contract makes them liable for its breach. Appellee has stated in its brief that equitable relief is available against Barnett, Owens and Ester. The fundamental equity rule is stated in 3 Pomeroy's Equity Jurisprudence (3rd ed.) 460. §879:

"If it does not appear that representations were made to the complainant, or with any expectation that they would come to his knowledge, or with any belief or reason to believe that they would induce him to act in the manner in question, there is no liability, for the reason that the necessary privity is not shown."

Barnett, Owens and Ester made no representations to appellee that they would remove the buildings. Nothing they did or said had anything to do with the making of the contract to remove the buildings, or with appellee's failure to pay the just compensation. The contract was made long before they acquired their interest in the property; and was breached before they purchased the

property. There was no privity between appellee and Barnett, Owens and Ester. Indeed, on the facts, there could not have been. There can be no liability as to them because the necessary privity on which to base equitable relief (as well as legal relief) is not shown.

With this principle in mind, the cases cited by appellee can be quickly disposed of. *Angle v. Chicago, St. Paul & c Ry.*, 151 U. S. 1, cited in footnote at page 16, on the proposition that appellants held the property in constructive trust, may or may not be applicable to the parties who breached the contract, but it has no application to Barnett, Owens and Ester, who lawfully acquired their property. The *Angle* case was one in equity to reach land in execution. A railway land grant had passed to the defendant by clear conspiracy, fraud and bribery in (1) inducing the judgment debtor to cancel a construction contract, (2) wresting control of the stock of the judgment debtor corporation to effectuate the cancellation, (3) inducing the legislature to cancel the land grant and (4) fraudulently securing the transfer of the land grant. Clearly this was a fraud case and the necessary privity was proved conclusively. The cited case is not authority for the proposition that mere knowledge of the terms of the contract renders Barnett, Owens and Ester liable in damages.

Nor is *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185, (cited appellee's Br. 17) in point. There the plaintiff had failed to notify the insurer of increased

insurance as required by his policy with defendant company. The court correctly held that plaintiff could not "benefit from his own breach of duty and obligation" by failing to notify the insurer of increased insurance. Clearly, privity was established. In the case at bar, Barnett, Owens and Ester are not parties in any contract with appellee, and have breached no duty or obligation. Mere knowledge of the terms of the contract does not constitute a breach.

Arguing that equity will permit an award of damages against Barnett, Owens and Ester, appellee cites (Br. 19), *Keystone Co. v. Excavator Co.*, 290 U.S. 240, 245, to the effect that in the exercise of equitable powers courts "are not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." In *Keystone* a patent was involved, and, since plaintiff had corrupted a witness and procured concealment of evidence in a prior infringement suit, the court held that said plaintiff could not come into court with unclean hands in a second infringement action. Again, there was no question of privity. *Keystone* is inapplicable to the case at bar.

Federal courts have rightly refused to be made an "abettor of inequity" (Appelle's Br. 20). To contend, as does appellee, that Barnett, Owens and Ester have "wronged" appellee and that the "right to some remedy" against them is clear, is nonsense in view of the findings of the trial court. They were not parties to the contract

and nothing they did or said in any manner misled appellee or induced appellee to act or not to act. There is no legal or equitable ground upon which damages can be awarded against them in this action.

II.

Appellee's second argument (Br. 20) is that the damages awarded in lieu of specific performance were not excessive. Again, this argument may or may not have validity as to appellants Century Investment Corporation and Virgil J. Pague, but it has none as to Barnett, Owens and Ester. Appellee cites no authority permitting specific performance or awarding damages against persons not parties to a contract or in privity with appellee. In this argument, appellee uses the term "appellants" broadly and carelessly, and though not applicable to Barnett, Owens and Ester, we are compelled to show that the argument is not well taken.

Appellee asserts (Br. 20, 21) that there were items for which appellants were liable in damages and which were not charged against them, referring to its deposits of rent. This assertion is grotesque. In the first place, no citation to the record is made. Secondly, the trial court found that appellee failed to prove payments of the amounts due under the condemnation judgment (R. 108, Supp. Finding II). The effect of this failure, of course, was that the interest of the appellee lapsed and its option to renew expired. Thirdly, appellee's own Exhibit 19 (a), (b), (c), shows that any deposits "pur-

portedly” (to use appellee’s phrase) made are still in the clerk’s possession and can be recovered any time appellee wishes to draw them.

There are simple answers to appellee’s statement (Br. 21) that “since the appellants did not see fit to bring up all the evidence adduced below, they are not in a position to allege a failure of proof.” First, the findings of the trial court are clear that appellee failed to prove its exclusive right to use and possession (R. 107-108, 111-112). Secondly, appellee itself could have brought up any portion of the record deemed helpful to it. Third, the fact is that the record before this court, and the findings made in the trial court, do not support appellee’s contentions as to Barnett, Owens and Ester.

Next, appellee says (Br. 21) that it would have received far higher bids for the buildings if the contract had not required removal from site. This is an opinion of counsel, not supported by the record. The record does show the amounts spent by Barnett, Owens and Ester to remodel and codify the buildings (R. 29; 44), which would seem to refute counsel’s opinion.

Appellee concludes its second argument (Br. 22) by stating that the necessity for incurring the Master’s fee was entirely due to the “wrongdoing” of the appellants and should be charged entirely to them. Once more, appellee indulges in semantics, apparently with the hope that if these appellants are called “wrongdoers” fre-

quently enough some one will believe that they are. Actually, Barnett, Owens and Ester being the sole fee owners of the real state, and the buildings having reverted to them by operation of law because of appellee's failure to pay just compensation, it was error to order an accounting of any kind from them. No portion of the Master's fee can properly be assessed against these appellants.

III.

Appellee's third argument (Br. 22) is that the findings of the District Court which are challenged by appellants are not clearly erroneous and so should not be disturbed on appeal. Appellee divides the argument into four parts:

- (a) Lack of determination of damages by the government's contracting officers (Br. 23);
- (b) Error of the trial court in ordering an accounting and challenge to Special Master's work (Br. 26);
- (c) District Court's supplemental findings and conclusions do not require reversal of judgment (Br. 32); and
- (d) Argument of Barnett, Owens and Ester that the trial court erred in denying dismissal (Br. 34).

In this argument, as throughout its brief, appellee seldom distinguishes between the two groups of appellants. The argument is therefore confusing and hard to follow. We will now refer to the portions of this argu-

ment directed toward Barnett, Owens and Ester and show its inconsistencies and the inapplicability of the cases cited in support of it.

A.

Since this part of its argument consists wholly of appellee's answer to Century Investment Corporation and Virgil J. Pague, we pass it.

B.

This part of its argument is also apparently devoted to answering arguments made by Century Investment Corporation and Virgil J. Pague. However, one or two observations are in order. On page 27 of its brief, appellee states:

“ . . . the contract involved went only to the buildings and did not involve the underlying lands for which the Government had exclusive use through June 30, 1956.”

The trial court held specifically that the government failed to prove its exclusive use to the land (R. 107-108; 111-112). Clearly, appellee's statement is inaccurate, for on the record there is no right to exclusive use due to failure to pay the just compensation awarded in the decree of condemnation. The right to exclusive use ended and the option to renew lapsed. Beyond that, because, as appellee states, “the contract involved went only to the buildings,” Barnett, Owens and Ester cannot be held for a breach of that contract, to which they were not parties.

In this connection, it must be noticed that appellee's argument concerning the continuation of the emergency declared by the President until July 1, 1956, is meaningless. Presidential Proclamations and Congressional Resolutions extending the duration of the emergency do not and cannot affect the necessity of paying the just compensation provided by the Fifth Amendment. Not having been paid, the right to exclusive possession terminated and the improvements placed on the land reverted by operation of law to Barnett, Owens and Ester, the fee owners of the real estate. (See authorities cited in Barnett, Owens and Ester Br. 20-29.)²

Beginning on page 30 of its brief, appellee suddenly changes direction and asserts that, since Barnett, Owens and Ester acquired their interests after the date of the contract, that fact "accords no support." Appellee does not say what it means by "support." At this point it must be apparent it makes no difference whatever when Barnett, Owens and Ester acquired their interest in the real property. If, as the court found, appellee failed to prove its right to exclusive use of the real estate, the fee owners could use their property as they wished. And since the improvements reverted to the owners upon nonpayment of just compensation, the fee owners of

²On page 29, appellee refers to the securing of the use of streets "as a part of their scheme knowingly to violate the statutory and contractual obligation to remove the temporary housing herein involved." Obviously, this comment cannot refer to Barnett, Owens and Ester, for as the record shows the use of the streets was granted on Oct. 28, 1953, prior to the time Barnett, Owens and Ester acquired any interest in their properties (R. 73).

the real estate are not subject to damages for breach of the contract for removal of the buildings by others who were parties to it. The default in paying the annual rental provided in the condemnation judgment was appellee's own unilateral act. Mere knowledge on the part of these appellants that the parties to the contract for removal had not performed their obligation, does not make the fee owners of the land any less the owners, nor does it affect the legal principle of reverter here involved.

It is also significant that appellee, under the condemnation judgment, had the right to renew its term from year to year upon payment of the just compensation provided in the decree. This right or option to renew was also abandoned or forfeited by appellee when it failed to pay the just compensation. That a right to renew is a valuable right has often been recognized. In *United States v. General Motors*, 323 U.S. 373, 376, Justice Roberts said:

"After judgment had been entered on the verdicts the court, on the Government's motion, opened the judgment and permitted the Government to amend its petition for condemnation to describe the interest taken as 'a term of years . . . expiring June 30, 1943, renewable for additional periods thereafter . . . at the election of the Secretary of War,' on specified notice of intent so to renew. . . . We do not understand that these facts alter the question

before us. The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded. . . . ”

The unilateral act of appellee in failing to pay the just compensation provided in the condemnation judgment had definite legal consequences: First, appellee lost its right to exclusive possession; second, appellee lost its right to renew the term for additional periods; third, the improvements on the real estate reverted, by operation of law, to the fee owners.³

Next, appellee asserts that this Court will not review the findings of the Special Master. Appellee does not meet or discuss the position of Barnett, Owens and Ester (Br. 39-45) that, assuming the propriety of a reference to the Master, his errors were such as seriously to prejudice Barnett, Owens and Ester, because his capricious and arbitrary use of improper accounting methods resulted in an erroneous net income figure for them. This erroneous figure was then carried into the judgment with the result that the judgment itself is erroneous.

³The governments' right to remove runs concurrently with its use and occupancy where its interest in the land was the exclusive use thereof from year to year and the right to renew during the war emergency and three years after. *United States v. 16.747 Acres*, 50 F. Supp. 389.

In the absence of specific provisions to the contrary, where the government reserves the privilege of removing structures at the termination of the lease term, ownership passes to landowner if structures are not removed

within the stipulated time, and, where the government condemned the land after the expiration of the lease, it was held that it must pay just compensation for the buildings erected by it. *United States v. Certain Parcels, etc., Outer Harbor Dock & Wharf Co.*, 131 F. Supp. 65, citing *United States v. Hayman*, 115 F. 2d 559, 601.

Outer Harbor involved a lease providing that "improvements 'shall be and remain the property of the government. . . , ' thus evidencing a clear intent contrary to the law of fixtures, . . . "

Hayman involved a lease by which radio towers remained the property of the United States and the government reserved the privilege of removing them at the end of the lease or within ninety days thereafter. The court said: "It is obvious that if the government should fail to remove the property before the expiration of the 90 days after the termination of the lease, the United States would lose the value of the property."

In the case at bar, the condemnation judgments provided that the title to improvements should remain in the United States, "except as hereinafter provided," and that "prior to the termination of the lease" appellee was required to remove the improvements. (See Appendix A where provisions of the condemnation judgments are quoted.)

All the appellee says in answer to the detailed and obvious errors of the Master is that this Court will not conduct a trial de novo and that the finding of a special master and a court are "well-nigh conclusive". It need not be supposed that Barnett, Owens and Ester ever asked this Court to conduct a trial de novo, but certainly it is proper for them to urge an appellate court to examine a record for clear error and arbitrary action. Appellee's authorities cited in support of this argument are not applicable to the situation here confronting the court.

Stonesifer v. Swanson, 146 F. 2d 671, 672 (cited appellee's Br. 30) was a suit to set aside an estate settlement agreement. The issues were referred to a master, whose report was approved and who found that there was insufficient evidence to establish a valid gift. The

circuit court held that the evidence not only supported the findings of the master and district court, but:

“ . . . in our opinion makes a contrary finding quite inconsistent with that portion of the testimony which is clearly established and uncontradicted as to the issue of the relationship of some of the parties,”

and

“ . . . we are not satisfied that the evidence warrants or justifies our disturbing the findings of the Master confirmed as they are by the District Court.”

The circuit court did review and found sufficient evidence to support the findings. For appellee to cite this case as authority for the court not doing what it did is unbelievable.⁴

⁴The other cases cited by appellee in its footnote (Br. 31) are equally inapplicable. *Westchester County Park Commission v. United States*, 143 F. 2nd 688, was an eminent domain case and did not involve a master. A syllabus for the case states: “On landowners’ appeal from condemnation award, appellate court cannot conduct trial de novo but trial court’s determination of fact must stand unless unsupported by substantial evidence. . . .”

Seagram Distillers Corp. v. New Cut Rate Liquors, 221 F. 2nd 815, 820, held that the evidence supported the trial court’s finding that, unless enjoined, defendant’s wrongful conduct in selling liquor below fair trade prices would irreparably injure plaintiff. Appellee’s quotation from this case is misleading for the court was saying: “The purpose of a preliminary injunction is to preserve the subject matter of the controversy in its then existing condition to preserve the status quo.” One of the cases used as the basis for its decision was *Mayo v. United States*, 309 U.S. 310, which was a direct appeal to the supreme court and which reversed the district court, saying, “We think the court committed serious error in thus dealing with the case upon motion for a temporary injunction.”

Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82, held that ample evidence supported the findings and judgment of the trial court, and that the fact that the lower court may have perhaps followed improper practices in directing counsel to prepare the findings would not authorize the appellate court to review evidence de novo but proper procedures required remanding to district court with directions to make new findings.

Empire District Elec. Co. v. Rupert, 199 F. 2d 941, an action for personal injuries, resulted in a reversal of a verdict of a jury on the ground that plaintiff was contributorily negligent. The court said: "We realize that this court is 'an appellate court sitting to review alleged errors of law and not to try the action de novo . . . nor can it be forgotten that a jury does not have the power to render a capricious and arbitrary verdict in total disregard of the evidence.'" No finer authority could have been cited by appellants Barnett, Owens and Ester to support their contention that the circuit courts recognize their clear duty to review errors of law and to prevent the trier of the facts (the master in the case at bar) from making capricious and arbitrary findings in total disregard of the evidence.

Ralston Purina Co. v. Novak, 111 F. 2d 631, an action for the recovery of the balance of the purchase price for hog feed, was tried by a jury. On appeal the appellant failed to set forth the erroneous ruling and the manner in which the trial court erred. The circuit court simply held: "The sufficiency of the evidence to sustain the judgment is therefore not open to review."

On the proposition that the "well-nigh conclusive nature of concurrent findings of a special master and the Court" have been frequently stated, appellee cites five cases (Br. 31).

Appellee's quotation from *Cooper v. Brown*, 126 F. 2d 874, 879, is incomplete. But the unquoted portion of the paragraph states: ". . . as there is evidentiary support for the finding of the master and of the court with respect to the income item, patently the finding cannot be considered as clearly erroneous. There is therefore no basis upon which we could disturb the finding. Fed. R.C.P. 52 (a), 28 U.S.C.A. following § 723 (c);. . . ."

Frank Adam Electric Co. v. Colt Patent Fire Arms Mfg Co., 148 F. 2d 497, was a patent suit and held that the findings of a special master, approved by the district court, are conclusive insofar as they are not clearly erroneous.

Parker v. United States, 126 F. 2d 370, held that since

the evidence before the master was not included in the record, the master's finding must be accepted.

Prentice v. Boteler, 141 F. 2d 175, a Ninth Circuit bankruptcy proceeding, held that confirmation by the district court and the referee of a trustee's sale will be approved in the absence of a clear showing of abuse of discretion.

Boyce v. Chemical Plastics, 175 F. 2d 839, held: "It is a settled rule of this and other courts that the findings of fact by a referee in bankruptcy, if supported by substantial evidence, are not clearly erroneous; and if approved, confirmed and adopted by the district court, they will not be disturbed on appeal."

All the foregoing authorities support the position of Barnett, Owens and Ester for review of rulings "clearly erroneous". As happened in this case, where a master arbitrarily and capriciously errs, the appellate courts have never refused to correct such errors, when the same have been properly and completely brought to their attention by objections to the master's report. In the case at bar the master's errors clearly appear on the face of the record itself, and his errors were carried into the judgment itself. Arbitrary and discriminatory action, abuse of discretion, and clear error will always be rectified by an appellate court.

C.

The third part of this argument by appellee (Br. 32) is devoted to a discussion of what is denominated "the asserted" ground that appellee lost its tenure in the lands underlying the buildings because of "alleged failure" to pay the compensation prescribed in the condemnation proceedings. The trial court found that the just compensation had not been paid (R. 108). Why call a specific finding of the trial court an "allegation"?

Appellee then states that there are simple answers to the contention of Barnett, Owens and Ester (Br. 20-29) that the appellee, having failed to pay just compensation, lost its right to exclusive possession. Let us examine those simple answers.

First, appellee contends that the government cannot be ousted from possession and use and the only remedy of anyone having interests in the land is a suit under the Tucker Act, because the government may "take" property in the exercise of the power of eminent domain without filing condemnation proceedings. The cases cited in support of this proposition by appellee (Br. 32) reveal immediately that appellee has failed to distinguish between a "losing" and a "taking". This case is not a *taking* of property in the exercise of eminent domain; it is a *losing* of exclusive use and possession of property and the option to renew the annual term, because of

failure to pay just compensation. Even though this should be obvious and dispose of the question, a short analysis of the cases cited by appellee quickly exposes their inapplicability to the facts of this case.⁶

⁵Here and at page 10 of its brief, appellee write of an administrative practice with respect to the payment of taxes. All of this discussion is wholly *de hors* the record.

⁶In *Campbell v. United States*, 266 U.S. 368, it was held that the erection of a nitrate plant on adjoining property did not constitute a "taking". The owner had been awarded compensation for two tracts but he was denied compensation for a third tract not taken but which he claimed was damaged by the use of adjoining lands. The court held: "The proposed use of lands taken from others did not constitute a taking of his property. . . ." and "In the absence of a taking, the provision of Fifth Amendment giving just compensation does not apply. . . ." This case is not authority for appellee's proposition that the government may take property without formal condemnation proceedings, since there was no "taking" involved.

In *Hurley v. Kincaid*, 285 U.S. 95, an injunction was denied to a landowner whose lands were threatened with flooding caused by increasing the height of the levees, being done under the lawful exercise of authority pursuant to an Act of Congress. It was held that, if the owner was damaged, he had an adequate remedy at law under the Tucker Act for any injuries. It was further held that he was not damaged yet and the court reiterated the common holding that the Fifth Amendment does not entitle him to be paid in advance of the taking. Again, there had been no "taking" and the case does not support appellee's proposition.

In *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, judgment against a contractor who had been doing work lawfully under the direction of the Secretary of War was reversed and it was held he was not personally liable. The court said: ". . . petitioner's claim resting upon the theory that there has been a taking has been found untenable". Again, this case is not authority for the proposition of appellee for the reason that there had been no "taking".

Causby v. United States, 328 U.S. 256, allowed damages for a "taking" held to result when aeroplane noises in landing and taking off from a lawfully used airfield resulted in depriving the adjoining owner of complete dominion and control of his property and damaged his chicken business. This is the situation for the Tucker Act because the damage flowed from a lawful act giving rise to an implied contract to pay for a "taking" of property.

Appellee's footnote 21 (Br. 32) ends with the statement, "and such possession may be taken even when the court has refused in condemnation proceedings to enter an order of possession. *United States v. Merchants Transfer & Storage Co.*, 114 F. 2d 324 (C.A. 9, 1944)." In the cited case, the United States, under

proper statutory authorization, had petitioned for immediate possession of the premises, as requested by the Secretary of War under the Second War Powers Act. The lower court held that the United States was not entitled to *immediate* possession. Upon a seizure of the premises by the army, the court ordered the United States to return the property and, in the event of its failure so to do, ordered that it be held liable in damages as for contempt. On appeal, this court held that the district court had not jurisdiction to order the United States to vacate the premises or to adjudge the government liable in damages for its failure to obey the injunction; further, that the trial court was in error in substituting its judgment on the question of public necessity for that of the Secretary of War acting under the Second War Powers Act. The holding of the court concluded: The Declaration of Taking should now be filed on just compensation determined speedily under the statutes. The Tucker Act was not involved. In addition, the original attempt to take was lawful under the Declaration of Taking Act. This case does not support appellee's proposition that appellee may take or continue to use property without formal condemnation proceedings being filed. A critical reading of the case suggests that, although the trial court was wrong in its procedure in issuing its injunction and threatening contempt, so also was the United States for not filing its Declaration of Taking and making its deposit with the Clerk of the Court.

The Tucker Act provides for suits against the United States government upon implied promises to pay compensation for injuries and damages resulting from lawful acts. It is not a substitute for condemnation proceedings. Here, where the government failed to pay the just compensation awarded by a judgment in condemnation, it loses its right to exclusive use. That ends the matter. If it can show a public use for the property, it can again condemn it and pay just compensation for it. The Tucker Act has no bearing on the situation here at issue.

It need not be added that appellee was not "ousted from its possession and use" (Appellee's Br. 32). By failing to pay just compensation, appellee, in effect, abandoned its right to exclusive possession and use and

its right to any option to renew its annual term. In any event, it was not "ousted" for the simple reason that it was not in lawful possession at the time Barnett, Owens and Ester acquired their interests in the property. Long prior to that time, the buildings had been sold and the appellee's rights abandoned (R. 73). Other third parties had been in possession between the time the buildings were sold by appellee and purchased by Barnett, Owens and Ester.

Appellee (Br. 33) next suggests that these appellants are making a collateral attack on the condemnation proceedings. This suggestion is absurd. Barnett, Owens and Ester are not attacking the condemnation action; they simply show the failure of appellee's own proof and that its failure to pay the just compensation provided for by that judgment had certain definite legal results—abandonment of appellee's right to exclusive use and possession.

Third and lastly, appellee (Br. 33) states that the district court did not purport to hold that the United States had lost its tenure in the land. Is this a play on words? In its complaint appellee alleged: "That the plaintiff, United States of America, at all times herein mentioned, had and does now have exclusive use of said real property. . . ." (R. 8). The finding of the district court is: "That it was incumbent upon the plain-

tiff herein to prove its exclusive right of possession of the land. . . ” and “That the plaintiff has not fully sustained that burden, in that, although the judgment on the declaration of taking and the judgments amending just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; . . . ” (R. 107-108). In short, appellee failed to prove one of the basic elements of its case. It makes no difference what happened or happens in the condemnation action. The court found that the appellee had failed to prove its exclusive right to the land.¹⁷

It is clear that, if the government does not and did not have exclusive right to the use and possession of the land, it was error to assess damages against Barnett, Owens and Ester as the fee owners thereof. And since Barnett, Owens and Ester were not parties to the contract, and did not in any way mislead appellee or cause appellee to take or refrain from taking any action, there

¹⁷ •References to the termination of the government's estate as of June 30, 1956 by notices filed in the condemnation proceeding are completely de hors the record. We may be permitted to state, also de hors the record, that, as of February 8, 1957, no order has been entered terminating the government's tenancy. There was filed, however, on October 4, 1956, a notice of the government's intent to terminate its leasehold and a motion to dismiss without payment of damages for parcels 1 to 10 inclusive. This notice and motion has not been heard as yet. Appellants Barnett, Owens and Ester answered the motion and stated that this case was before the appellate court and that damages should not be waived on motion; and that by responding to the motion these appellants did not admit that the tenancy was in effect, but alleged that, to the contrary, the tenancy had already been terminated by operation of law. We are filing in this Court a certified copy of the Clerk's Docket in the condemnation action to show the status of that proceeding as of this time. See Appendix D.

is no legal or equitable basis upon which a judgment against them can be sustained.

D

In this concluding portion of its argument, appellee states that the trial court was correct in denying Barnett, Owens and Ester's motions to dismiss, because of the equitable nature of the case. This argument has been answered heretofore. Suffice it here to say that Barnett, Owens and Ester were not parties to the contract, and nothing they did or said in any manner misled appellee or induced appellee to act or not to act, nor caused appellee to default in payment of just compensation decreed as the annual rental. Thereafter, according to the judgment in condemnation and the stipulations made a part of the judgment, the option to renew lapsed and the buildings, not being removed prior to the expiration of the term as provided therein, became the property of the fee owners of the land. The right to remove prior to termination was lost by appellee—it had the option and abandoned it.

It was error to deny the motions of Barnett, Owens and Ester to dismiss them on the grounds that appellee neither stated nor proved a claim against them on which judgment could be based.

Conclusion

In their opening brief, Barnett, Owens and Ester contended:

1. Being owners of the land underlying the buildings, not being parties to the contract sued upon, and there being no findings of the trial court justifying the assessment of damages against them, there is no basis in law or fact upon which to sustain the judgment as to them;

2. The denial of their motions to dismiss before trial on the ground that the complaint failed to state a claim (R. 22-23), and the denial of the motion (R. 119) to dismiss after trial for failure to prove a claim on which judgment could be based, was error; and

3. The trial court erred (R. 115) in confirming and adopting the Special Master's reports, which (a) failed to apply proper accounting methods or (b) proper depreciation schedules, (c) incorporated clear error and obvious inconsistencies, and (d) for which he was allowed an exorbitant fee.

Appellee answered these contentions by arguing:

1. There was a breach of contract by appellant Century Investment Corporation and that Barnett, Owens and Ester had knowledge of and participated in those "breaches";

2. The damages awarded in lieu of specific performance were not excessive; and

3. The findings by the trial court are not clearly erroneous and so should not be disturbed on appeal.

Clearly, appellee did not meet the contentions of

Barnett, Owens and Ester. The fact that they had knowledge of the provisions of the contract with Century Investment Corporation for removal of the buildings and of its breach, prior to the time they acquired any interest in the properties, cannot and does not render them liable, either at law or in equity, for breach of that contract to which they were not parties. Nor does knowledge of the terms of the contract make them any less the owners of the real estate. By its unilateral act in failing to pay the just compensation provided in the condemnation decree, appellee lost its right of exclusive use and possession of the real estate and lost its right to renew its term, and, by operation of law, the improvements then on the real estate reverted to the fee owners. Thus it was error to order an accounting of rents received by Barnett, Owens and Ester, and it was error to confirm the obviously arbitrary and incorrect findings of the Master and incorporate those findings into a judgment against Barnett, Owens and Ester, together with a judgment for a part of an exorbitant fee awarded to the Master.

Whatever may be the validity of its argument with respect to appellant, Century Investment Corporation, which signed the contract, and to appellant, Virgil J. Pague, who was found by the court to be the real party in interest (R.64-65)—the appellants who actually breached the contract—appellee has failed to establish

a legal or factual basis upon which the judgment against Barnett, Owens and Ester can be supported.

Appellee's second contention that the damages awarded in lieu of specific performance are reasonable, is inapplicable to Barnett, Owens and Ester, because there is no proper ground on which to award any damages against them.

Appellee, in its third contention, states that the findings of the trial court are not clearly erroneous and should not be disturbed on appeal. Appellants Barnett, Owens and Ester have not, and do not, contend that the findings of the trial court are erroneous. They do contend that, based on those findings, it was error in law to award judgment against them, and that this court, on those findings which state the facts here existing, will reverse the judgment of the trial court and dismiss Barnett, Owens and Ester.

VERNON W. TOWNE,
ARTHUR G. BARNETT,
ALEC DUFF,

*Attorneys for Barnett,
Owens and Ester*
1304 Northern Life Tower
Seattle 1, Wash.

APPENDIX A

The burden was upon the appellee in this case to prove its allegation that "the plaintiff [appellee] at all times herein mentioned, had and does now have exclusive use of said real property. . . ." (R. 8). The trial court found that appellee did not prove its right to exclusive possession (R. 107-108; 111-112).

The purported right to exclusive possession was founded on certain condemnation proceedings in the District Court (Cause No. 1143 of which in the case at bar the trial court took judicial notice. R. 64). To aid this court in understanding the condemnation proceedings—in the absence of any explanation thereof by appellee—the following reference to Exhibits introduced in this action will be helpful:

In the condemnation proceedings the properties now owned by appellants Barnett and Owens are referred to as Parcels 3 and 4. The properties now owned by Ester are Parcel 5 and a portion of Parcel 6.

Appellee first took possession under an order of the District Court dated February 21, 1945, which preceded its filing of a Declaration of Taking and a deposit of estimated compensation. The Declaration of Taking was dated May 23, 1945, and was filed June 15, 1945 (Ex. 34). Judgment on the Declaration of Taking (Ex. 35)

was entered June 16, 1945 and vested the exclusive use of the lands in appellee "for a period of one year, with the right to renew from year to year for the duration of the existing national emergency and three years thereafter, together with the right to remove at the termination of such use all improvements constructed or placed thereon. . . ."

This judgment was amended frequently and the amendments were based on stipulations entered into between appellee and successor owners of specific parcels. A list of amended judgments, affecting Parcels 3, 4, 5 and 6 (with which we are concerned) follow:

Parcel 3 (now owned by Barnett and Owens):

Judgment of February 14, 1946. (Ex. A-31)

Judgment of May 3, 1951, (Ex. A-32)

Judgment of May 23, 1952 (Ex. A-30)

Parcel 4 (now owned by Barnett and Owens)

Judgment of September 28, 1945, (Ex. A-33)

Judgment of February 20, 1952, (Ex. A-34)

Parcel 5 (now owned by Ester)

Judgment of September 28, 1945, (Ex. A-2)

Judgment of July 23, 1951, (Ex. A-35)

Judgment of March 21, 1952, (Ex. A-36)

Parcel 6 (now partially owned by Ester)

Judgment of September 28, 1945, (Ex. A-37)

Judgment of May 3, 1951, (Ex. A-38)

Judgment of March 21, 1952, (Ex. A-39)

As stated, these judgments were based on stipulations between appellee and the then owners of the fee title. While each one varied in detail, all contained identical language regarding just compensation and the amount of rental to be paid for the term. The following is quoted from the judgment of February 14, 1946 (which affected Parcel 3 and is Ex. A-31) and, as stated, each of the judgments also contained this language:

“1. That the sum of . . . is the just compensation and the total amount of damages to be awarded and paid for the taking by the United States of America for the exclusive use of said property . . . for one year beginning February 21, 1945, the date the United States acquired possession. . . .

“3. That the United States may exercise its right to renew the estate taken in said land from year to year as provided in the declaration of taking. . . .

“6. . . . Title to all such alterations, structures, fixtures and improvements shall be and remain in the United States, except as hereinafter provided;

“7. Prior to the termination of the lease, the Federal Public Housing Authority shall remove all buildings erected or constructed by it upon the demised premises; . . .”

APPENDIX B

Illustrations of statements *de hors* the record contained in appellee's brief follow:

1. Page 4, footnote 4, refers to the government's extension of its exclusive use for another yearly period to February 21, 1957, but subsequently terminated as of June 30, 1956. The same matter is also referred to on page 33, footnote 22, stating that the termination, as of June 30, 1956, was by appropriate notices filed by the government in the condemnation proceedings.

All of this is wholly outside the record made in this case. (See also the certified copy of the clerk's docket of the condemnation action which has been filed in this court and Appendix D.)

2. Page 6, footnote 5, states " . . . In this connection, the Public Housing Administration has advised: 'There is no justification nor consideration for such an extension. The Seattle Housing Authority was not the agent of this Administration for that purpose. It was not party to the Removal Contract.' . . . "

This is another statement completely *de hors* the record.

3. Pages 9, 26, 29 and 35 contain references to an Oral Decision of the trial court (set out in the Appendix to Appellee's Brief, pp. 36-41).

Again, the Oral Decision is not a part of the record before this court. Of more importance, however, is the fact that this oral opinion, the gist of which was to compel removal of the buildings, was rescinded and reversed by the trial court prior to the entry of judgment which did not order removal of the buildings.

4. Page 10 contains a long discussion of the administrative practice with regard to the payment of real estate taxes.

All of this is de hors the record.

5. Page 10 also contains the statement that "the district court apparently used the tax matter discussed above" as the reason for awarding damages rather than specific performance.

A trial judge always has the right to change his oral decision, amend it, or disregard it, if upon further reflection, and prior to the entry of judgment, he changes his mind. Of what value is an oral decision which has been changed?

6. Page 13 (item 2) and Pages 20 and 21 state that there are not included in the award of damages a number of items of damages to the United States.

All of this is de hors the record and is pure speculation.

APPENDIX C

SEATTLE, WASHINGTON

OCTOBER, 9TH 1953

CENTURY INVESTMENT CORPORATION

914 Dearborn Street

Seattle

Attn: Mr. A. Rontai and Mr. O. Cohen

GENTLEMEN:

This letter will confirm our agreement as regards Building No. 102 and Building No. 103, located on the Duwamish housing project, Wash.-45302, which I have purchased as an individual from the Century Investment Corporation of Seattle.

The purchase price is \$2051.09 for each building, however, building No. 103 has only 10½ apartments and I therefore will receive credit for 1½ apartment which has been cut from building No. 103. I will also pay the sales tax on this purchase if so required by law.

I will also assume personal responsibility for proper release by Seattle Housing Authority for removing said two buildings, and I hereby agree to hold A. Rontai and Orville Cohen and Century Investment Corporation, free and harmless on any action taken by Seattle Housing Authority for removal of Buildings No. 102 and No. 103.

I further authorize A. Rontai, Treasurer of Century Investment Corporation, to charge the sale price of these buildings to me personally and against my investment in Century Investment Corporation, of which I am the President.

All statements made in this letter apply only to Building No. 102, 6500 Maynard Ave. and Building No. 103, 6528 --6th Ave. South, Seattle, but does not apply to any other buildings which are located near by and are part of Duwamish Bend Apts., Wash.-45302.

Signed this 9th Day of October 1953, at Seattle, Wash.

/s/ V. J. Pague

V. J. Pague, Purchaser

/s/ A. Rontai

Century Investment Corp.

Treasurer and Director

[Plaintiff's Exhibit 17]

APPENDIX D

SEATTLE, WASHINGTON

DECEMBER 5TH, 1953

CENTURY INVESTMENT CORPORATION

914 Dearborn St.

Seattle, Wash.

Attention: Mr. Albert Rontai and Orville Cohen

GENTLEMEN:

The undersigned, purchaser from Century Investment Corporation of the following described buildings in the Duwamish Bend Apartments, Wash. - 45302:

Building No. 102	6500 Maynard Ave.
------------------	-------------------

Building No. 103	6528 - 6th Ave. So.
------------------	---------------------

Building No. 104	6542 - 6th Ave. So.
------------------	---------------------

Building No. 105	6361 Maynard Ave.
------------------	-------------------

hereby assumes personal responsibility for full and proper release by the Seattle Housing Authority of the Century Investment Company's contract for the removal of said buildings and site clearance and hereby agrees to save and hold harmless Albert Rontai, Orville Cohen and the Century Investment Corporation on account of any action taken by the Seattle Housing Authority for removal of said buildings and site clearance, and further agrees to hold said persons and corporation harmless under Hartford Insurance Company Bond No. 2790141,

given to the Seattle Housing Authority for the faithful performance for said corporation's contract for building removal and site clearance, it being understood that the Seattle Housing Authority now requires the removal of said buildings and site clearance by January 15, 1954. DONE in Seattle, Washington this 5th day of December, 1953.

/s/ Virgil J. Pague
Virgil Pague

Witnessed by:

/s/R. F. Edmondson

[Plaintiff's Exhibit 18]

APPENDIX E

Being certified copy of document in Cause No. 1143, from April 18, 1955 to and including November 14, 1956, U. S. v. Certain Lands in King County, et al, said document being filed in Circuit Court.

1956

Apr. 3	Filed Clerk's receipt of \$541.00, Par. 1 through 10 inclusive	(482)
Apr. 16	Filed Stipulation for Dismissal of Par. 14 (Balance)	(483)
Apr. 16	Filed Agreement for termination of exclusive Us. Par. 14	(484)
Apr. 16	Filed & Ent. Order dismissing Par. 14 (Balance).....	(485)
June 4	Filed Stipulation for Dismissal Parcel 21	(486)
June 4	Filed Agreement for termination of exclusive use	(487)
June 4	Filed and entered Order of Dismissal Parcel 21	(488)
June 4	Filed Stipulation for Dismissal Parcel 11	(491)
June 4	Filed Petition for withdrawal of funds year beginning Feb. 21, 1955	(489)
June 4	Filed Order directing payment of funds parcel 11	(490)
June 4	Filed Agreement for Termination of exclusive use Parcel 11	(492)
June 4	Filed and entered Order of Dismissal Parcel 11	(493)
June 19	Filed receipt for Check No. 10167, Parcel No. 11	(494)
June 25	Filed petition for withdrawal of funds deposited for year beginning Feb. 21, 1954 (Parcel 17)	(495)
June 25	Filed and ent. order directing payment of funds deposited for year beginning Feb. 21, 1954 (Parcel 17)	(496)
June 25	Filed stipulation for dismissal, Parcel 17	(497)
June 25	Filed and ent. order of dismissal, Parcel 17	(498)
June 25	Filed agreement for termination of exclusive use, Parcel 17	(499)
July 2	Filed receipt for Check 10176, Parcel 17	(500)
Oct. 4	Filed Plaintiff's notice of termination of leasehold and motion to dismiss without payment of damages, Parcels 1 to 10 inclusive	(501)
Oct. 18	Filed Marshal's return on notice of termination of leasehold and motion to dismiss action without payment of damages, Virgil T. Pague and sixteen and not found, Mary J. Chase, deceased and not found Flo Rae	(502)
Nov. 14	Filed Answer of Edward R. Ester et ux to Ptff's Notice of Termination of Leasehold and motion to dismiss action without payment of Damages	(503)
Nov. 14	Filed Answer of Arthur G. Barnett, et ux, et al to Ptff's Notice of Termination of leasehold & Motion to Dismiss action without payment of Damages	(504)

No. 15219

IN THE
**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

CENTURY INVESTMENT CORPORATION
and VIRGIL J. PAGUE, *Appellants,*
vs.

UNITED STATES OF AMERICA, *Appellee.*

ARTHUR G. BARNETT and VIRGINIA N.
BARNETT, His Wife; DONALD F. OWENS
and JEAN OWENS, His Wife; EDWARD R.
ESTER and LORRAINE M. ESTER, His Wife,
Appellants,

vs.
UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court,
Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

**REPLY BRIEF OF CENTURY INVESTMENT
CORPORATION AND VIRGIL J. PAGUE**

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,
*Attorneys for Century Investment
Corporation and Virgil J. Pague*

Office and Post Office Address:
800 Hoge Building
Seattle 4, Washington



FRAYN PRINTING COMPANY

FILED

552 25 1257

No. 15219

IN THE
**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

CENTURY INVESTMENT CORPORATION
and VIRGIL J. PAGUE, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ARTHUR G. BARNETT and VIRGINIA N.
BARNETT, His Wife; DONALD F. OWENS
and JEAN OWENS, His Wife; EDWARD R.
ESTER and LORRAINE M. ESTER, His Wife,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court,
Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

**REPLY BRIEF OF CENTURY INVESTMENT
CORPORATION AND VIRGIL J. PAGUE**

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,
*Attorneys for Century Investment
Corporation and Virgil J. Pague*

Office and Post Office Address:
800 Hoge Building
Seattle 4, Washington



FRAYN PRINTING COMPANY

INDEX

	<i>Page</i>
I. The Government Failed to Prove Any Damages	1
II. There Was No Occasion for Specific Performance and There Was No Occasion for Damages	8
III. The Government's Brief Goes Outside the Record	10
IV. Appellant Pague Is Not the Alter Ego of Century Investment Corporation.....	12

TABLE OF CASES

	<i>Page</i>
<i>Bell Aircraft Co. v. United States</i> , 100 F. Supp. 661, 120 Ct. Cl. 398, affirmed 344 U. S. 860, 97 L. Ed. 668.....	6
<i>Lomax Transportation Co. v. United States</i> , 183 F. (2d) 331 (9 C.C.A. 1950)	7
<i>Peter Kewitt Co. v. United States</i> , 109 Ct. Cl. 390.....	3
<i>Phoenix Bridge Co. v. United States</i> , 85 Ct. Cl. 603.....	6
<i>United States v. American Surety Co.</i> , 322 U. S. 96, 88 L. Ed. 1158.....	3
<i>United States v. Standard Rice Co.</i> , 323 U. S. 106, 89 L. Ed. 104.....	2

TEXTS CITED

49 Am. Jur. 196.....	8
91 Corpus Juris Secundum 212.....	5

No. 15219

IN THE
**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

CENTURY INVESTMENT CORPORATION
and VIRGIL J. PAGUE, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ARTHUR G. BARNETT and VIRGINIA N.
BARNETT, His Wife; DONALD F. OWENS
and JEAN OWENS, His Wife; EDWARD R.
ESTER and LORRAINE M. ESTER, His Wife,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeals from the United States District Court,
Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

**REPLY BRIEF OF CENTURY INVESTMENT
CORPORATION AND VIRGIL J. PAGUE**

I.

**THE GOVERNMENT FAILED TO PROVE
ANY DAMAGES**

The brief of the government argues that the lower court in lieu of granting specific performance of the contract for the removal of the buildings could in-

stead grant damages. (Respondent's Brief, page 13, et seq.) If an equity court has the right to grant damages in lieu of specific performance of the contract, it must still follow some legal *measure of damages* and cannot allow damages merely as a punitive measure, but must grant them upon some theory of compensation for pecuniary injury. The government's argument begs the question as to the validity of the government's case with respect to damages. The government in this case failed to prove any monetary damages. This failure of proof was fatal to any recovery of damages.

This is a civil action for breach of contract. The government in this case contracted with a citizen to accomplish a certain purpose and the government prepared the contract and is no different from any other litigant with respect to the application of the laws relative to contracts. Liquidated damages were not provided for. Actual pecuniary injury to the government was not proved. If the government failed to draw a contract which accomplished what Respondent thinks should have been its objects, the government is nevertheless bound by the contract that it did enter into. The Supreme Court of the United States in the case of *United States v. Standard Rice Company*, 323 U. S. 106, 89 Law Edition 104, expressed the applicable rule on page 111, where it said:

"Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs . . . We will treat it like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made. *U. S. v. American Surety Company*, 322 U. S. 96, 88 Law. Edition 1158, 64 S. C. 866."

It was the government which prepared paragraph 2 of the general conditions of the contract (Tr. 13) prescribing the performance security and stating:

"The purchaser is liable for any expense incurred by the government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein, and leaving the site in a satisfactory condition. The purchaser shall be liable for the full amount of damages *determined by the contracting officer* to have been occasioned by his failure to comply with the provisions of this sale, whether or not such damages are secured by the performance security." (Emphasis supplied.)

The government is bound by the general rule that a contract will be most strongly construed against the party preparing it. The Court of Claims in the case of *Peter Kewitt Company v. United States*, 109 Ct. Cl. 390, applied this rule and said at page 418:

"This rule is especially applicable to government contracts where the contractor has nothing to say as to its provisions."

By the terms of the contract entered into between

the parties the method of determining damages was stated and the determination was entrusted to the contracting officer.

The government has not established a determination by the contracting officer of the damages in this case, and the parties did not contract for the court to substitute its judgment for that of the contracting officer in determining damages. Respondent's brief, on page 25, attempts to argue that this failure of the government to prove the determination of the contracting officer was not raised in the proceeding below. This is a gross error as this point was urged continuously and vigorously at all stages of the proceeding. Those portions of this appellant's brief relating to the failure of the contracting officer to make a determination have their counterpart in the trial brief of these defendants filed in the lower court and identified as document 73 in the certificate of the clerk to record on appeal (Tr. 131). Reference is made to page 12 of that memorandum (Tr. 131). The failure of the government to prove the decision of the contracting officer as to damages was a fatal failure of proof.

The respondent's statement on page 23 of its brief to the effect that the provision of the contract calling for determination of damages by the contracting officer is not binding on the government, ignores plain legal principles. Counsel for the gov-

ernment cite no cases to sustain that contention and it has been repeatedly held that a provision in a contract leaving determinations to a contracting officer will be binding upon both the government and the other contracting party. 91 C. J. S. 212 states the general rule as follows:

“A contract with the United States may lawfully provide that a specified government officer or board shall have the right to make certain determinations with respect to the performance of the contract, and that the decisions of such officer or board shall be binding on the parties. Accordingly, when the parties to a government contract agree that the decision of an engineer or other officer or board as to matters of dispute that may arise during the execution of the work, such as disputes involving questions of fact, shall be final and conclusive, or that the decision of the officer shall be determinative of other particular matters specified in the contract, such decision ordinarily is final, and it is not subject to revision in the courts, as discussed infra subdivision c (3) of this section. Similarly, where it is agreed that a specified officer shall interpret the drawings, specifications, etc. or shall determine what is required under the contract, the determination of the officer is conclusive. Under such provisions, *both the United States and the contractor are bound by the officer's ruling . . .*” (Emphasis supplied.)

A contracting officer under such a provision in a contract does not act exclusively as the government's advocate but has the duty of being a neutral arbitrator and such a provision in the contract gives the parties the assurance that the decision will be

made by one familiar with the immediate facts and competent to make an expeditious decision. Federal courts have repeatedly held that the government is bound by such a provision of the contract and there is no authority to substitute the judgment of any other officer or agent of the government for the judgment of the contracting officer. Thus, in *Phoenix Bridge Company v. United States*, 85 Ct. Cl. 603, where a contract provided that the amount of liquidated damages should be determined by the contracting officer, it was held that an initial decision by the Comptroller General assessing liquidated damages was invalid. The court said on page 629:

“In the *United States v. North American Commercial Company*, 74 Fed. 145, 149, it was held that where a contractor reposes upon the good faith and the discretion of some public officer representing the government, that is an implied obligation upon the officer that he will not act arbitrarily or capriciously but will exercise an honest judgment and that ‘the party who has agreed to be bound by that judgment is entitled to have it exercised in good faith by the officer nominated *and cannot be bound by the substituted judgment of another authority.*’ ” (Emphasis supplied.)

The case just cited is directly in point here and illustrates the fact that the contractor, as well as the government, has the advantage of the provision for determination by a contracting officer. A case to the same effect is *Bell Aircraft Company v. United States*, 100 Fed. Suppl. 661, 120 Ct. Cl. 398,

affirmed 344 U. S. 860, 97 Law Ed. 668. There it was held that a decision made by a contracting officer, as specified in the contract, must be the only effective decision and that the comptroller general had no right to substitute his judgment for that of the contracting officer.

The government in this case is bound by the provisions of the contract which it drew and the contractor was entitled to have the damages, if any, determined by the contracting officer and there is no authority under the contract to substitute the judgment of the court. We suspect that the reason a contracting officer's decision was not produced was because a contracting officer would not have found that any damages occurred. Certainly there was no evidence in this case of any actual monetary damage suffered by the government, nor any expense incurred by the government in connection with the failure to remove from the premises the buildings which the government had sold.

The rule that the government has the same duty of proving damages as any other litigant has been recognized by this court.

In the case of *Lomax Transportation Company v. United States*, 183 F. (2d) 331 (9CCA 1950), this court said on page 333:

“Though it follows that appellant was under the contract absolutely liable for any loss or

damage to the supplies stored with it, it was, of course, incumbent upon the government to prove by competent evidence the amount of the damages sustained."

The government, like any other litigant, cannot recover damages without proving them. The profits earned by appellants from renting the buildings have no remote relation to expense or damage incurred by the government.

II.

THERE WAS NO OCCASION FOR SPECIFIC PERFORMANCE AND THERE WAS NO OCCASION FOR DAMAGES

The government argues that damages were awarded here in lieu of specific performance. Damages in lieu of specific performance will not, under recognized legal principles, be allowed unless there was a right to specific performance. There was no such right here. The rule is stated in 49 Am. Jur. 196 as follows:

"The awarding of damages by a court of equity in a suit for specific performance in lieu of a decree of performance is exceptional, for the very reason that jurisdiction of such suit depends on the essential fact that a judgment at law for damages would not be an adequate remedy, and jurisdiction to award damages is exercised only under special circumstances, to prevent injustice. Ordinarily, a bill for specific performance will not be retained for the assessment of damages where the plaintiff fails to

make out a case for specific performance, and no other special equity is shown which will support jurisdiction of the court . . .”

In this case the court specifically held in the supplemental findings of fact and conclusions of law (Tr. 107, 108) that the government had not sustained the burden of proving its exclusive right to possession of the land and therefore was not entitled to have the buildings removed. The court specifically found:

“Findings of Fact

I.

“That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of land upon which the buildings, furniture, furnishings, equipment and appurtenances involved herein have, at all times material to this action, been and are now located.

II.

“That the plaintiff has not fully sustained that burden in that although the judgment in the declaration of taking and the judgment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the court cannot find that such installments have been paid and accordingly the court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said buildings and clear the sites upon which they stand. This finding is based upon the necessity of the plaintiff establishing in this action its exclusive right of possession of said real estate.”

If the government had no right to specific performance of the contract by reason of its failure to prove its exclusive right to possession of the land, it also had no right to obtain damages for use of that land to which it had not established exclusive possession.

III.

THE GOVERNMENT'S BRIEF GOES OUTSIDE THE RECORD

In its brief, the government makes frequent excursions outside of the record to volunteer information not proved at the trial and not in accordance with the facts. On page 14 of its brief the government counsel says:

"Also the government had been obliged to expend money to renew its use and occupancy of the land for an additional year . . ."

There is absolutely no proof that the government expended any money to renew its use and occupancy.

The government, on page 10 of its brief, alleges:

"The administrative practice had been for the taxpayers to pay the taxes and then submit their tax statements to the Public Housing Administration for reimbursement."

This statement in the brief, which is apparently intended to indicate that the court was wrong in holding that the government failed to pay the consideration for the leasehold is wholly without the record

and is contrary to what these appellants know to be the facts. It will be noted that counsel cite no portion of the record for this statement and the fact that these payments were not made as found by the court (Tr. 107) is strong proof that there was no such administrative practice. The decision of the district court to the effect that the government had failed to establish its right to exclusive possession was an important part of the supplemental findings of fact, and the statement made by counsel that: "Apparently in order to avoid the forced removal of the buildings (which had been improved to meet the code requirements of the City of Seattle, *supra*, page 8) the district court apparently used the tax matter discussed above as justification for awarding damages only rather than ordering specific performance of the contract as it had previously determined" (Respondent's brief, page 8), is a gratuitous assumption not justified by the action of the lower court nor by anything in the record.

The counsel for the government in footnote 5 on page 6 of their brief again introduce matter not within the record by quoting what they are advised by the Public Housing Administration with respect to the granting of extensions by the housing authority of the City of Seattle. The footnote says:

"In this connection the Public Housing Administration has advised . . ."

We submit that matter introduced for consideration of the court in this manner is not properly to be considered in the disposition of this appeal.

IV.

APPELLANT PAGUE IS NOT THE ALTER EGO OF CENTURY INVESTMENT CORPORATION

Counsel for the government attempts to infer that Virgil J. Pague is the alter ego for Century Investment Corporation (Respondent's brief, page 23). There is nothing in the record to sustain any such contention and the citation of statements by other appellants having adverse interests to this effect are entirely baseless. Pague was only one of three equal shareholders according to the evidence. The lower court found in paragraph 5 of the findings of fact (Tr. 23) that the incorporators of the company were Virgil J. Pague, Albert A. Ronati, and Orville Cohen. The lower court made no finding that Pague was the alter ego of Century Investment Corporation and the fact that there were two other stockholders holding $\frac{2}{3}$ of all the stock in the corporation negatives any contention that Pague was the alter ego of the corporation. There is nothing in the record to indicate that Pague controlled the corporation. The lower court did not deal with Pague as the alter ego of the Century Investment

Corporation. There was no evidence upon which any such conclusion could have been arrived at and there is no justification for the reference in the government's brief to Pague, the owner of the minority of the stock of the corporation, as being the alter ego of Century Investment Corporation.

Respectfully submitted,

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,

*Attorneys for Century Investment
Corporation and Virgil J. Pague*

Office and Post Office Address:
800 Hoge Building
Seattle 4, Washington

United States Court of Appeals
For the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His Wife;
and EDWARD R. ESTER and LORRAINE M. ESTER His Wife,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING
By Barnett, Owens and Ester

VERNON W. TOWNE
ARTHUR G. BARNETT
ALEC DUFF

Attorneys for Appellants.

1304 Northern Life Tower,
Seattle 1, Washington.

United States Court of Appeals
For the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J.
PAGUE, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His
Wife; DONALD F. OWENS and JEAN OWENS, His Wife;
and EDWARD R. ESTER and LORRAINE M. ESTER His Wife,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING
By Barnett, Owens and Ester

VERNON W. TOWNE
ARTHUR G. BARNETT
ALEC DUFF

Attorneys for Appellants.

1304 Northern Life Tower,
Seattle 1, Washington.

INDEX

	<i>Page</i>
Grounds	1
Argument	2
A. The trial court had already adjudicated the issues of plaintiff's claim to exclusive posses- sion	2
B. Error arises from confusion in reading find- ings of Oct., 1955, and supplemental findings of April, 1956.....	4
C. A further explanation.....	7
Conclusion	11
Certificate.....	12

TABLE OF CASES

<i>U.S. v. General Motors</i> , 323 U.S. 373, 376, ftn. at 377	2, 5
---	------

United States Court of Appeals

For the Ninth Circuit

CENTURY INVESTMENT CORPORATION and
VIRGIL J. PAGUE, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

ARTHUR G. BARNETT and VIRGINIA N.
BARNETT, His Wife; DONALD F. OWENS
and JEAN OWENS, His Wife; and ED-
WARD R. ESTER and LORRAINE M. ESTER,
His Wife, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

No. 15219

PETITION FOR REHEARING

By Barnett, Owens and Ester

Come now the appellants, Barnett, Owens and Ester, and respectfully petition this court for a rehearing of the above-entitled matter in which the court entered its opinion on Oct. 20, 1957.

GROUND

The order of a new trial for the ascertainment of damages, if any, accruing to the plaintiff as ground rent because of trespass, or on the theory of implied contract to pay rent, by these appellants (opinion of the circuit court page 7, last paragraph), is a mistake apparent on the face of the opinion:

(1) Because the circuit court stated on page 4 of its

opinion that the plaintiff had not proved payment of just compensation which it was obligated to pay to entitle it to continued exclusive possession of the tracts in question; and

(2) Because the trial court abandoned its finding of liability to the government based on its right to exclusive possession (Findings Oct. 21, 1955, R. 63-64; Findings XII to XV, R. 70-73) and on April 26, 1956, entered supplementary findings substituting a different ground of liability, namely, money damages in lieu of specific performance, and reciting the court's view of equity (R. 107-113).

Counsel respectfully submit that there is a contradiction in the appellate court's opinion which states, at one point (page 4), that the plaintiff had not paid the just compensation to entitle it to exclusive use, and, at another point (page 7), that the plaintiff had exclusive use.

ARGUMENT¹

A. The trial court had already adjudicated the issues of plaintiff's claim to exclusive possession

It is submitted that the trial court's abandonment of the finding of liability based on the plaintiff's failure to prove the allegations of right to exclusive possession (as alleged in paragraph VIII of its complaint,

¹ Some of the following arguments are in the briefs of these joint appellants but are herein emphasized in the light of the appellate court's opinion. See Br. of Barnett, et al: p. 7(b) ; 1 and 11, pp. 14-15; p. 22 citations; p. 28; Reply Br. p. 16 citing *U.S. v. Gen. Motors*, 323 U.S. 373, 376, fn. 4 at 377 on paying compensation for the right to renew; pp. 22, 24, 25 and D. p. 27.

R. 8)² is controlling. The plaintiff's claim of exclusive possession had already been adjudicated and denied. Confusion arises from the two sets of findings. But the confusion exists only because of the trial court's attempt to exercise equity in supplemental finding III (R. 108) wherein the plaintiff's *claims* were merely recited. This finding does not disturb the finality of the two preceding supplemental findings I and II (R. 107-108) which pinpoint the plaintiff's absolute failure to prove its title! The appellate court, we feel, has misapplied the October, 1955, findings, thus allowing the plaintiff another chance to do what the trial court expressly found it failed to do.

Query: Where the condemnor has not paid the owner just compensation, can the owner be made liable to the condemnor for trespass, or on the theory of implied contract to pay rent?

The circuit court in its opinion on page 2 stated:

"The facts which must be considered in passing upon these and other questions are established by the unchallenged findings and supplemental findings of fact."

This court, therefore, found that the plaintiff had not paid the just compensation to entitle it to continued exclusive possession of the tracts in question, and the plaintiff had not fully sustained its burden of proving its right to the continued exclusive possession of the land in question, as alleged in its complaint.

²Paragraph VIII (R. 8) of the government's complaint alleged "that the plaintiff, the United States of America, at all times herein mentioned, had and does now have exclusive use of said real property upon which said temporary dwellings are presently located . . ."

Supplemental Finding I states:

“That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the land upon which the building, furniture, furnishings, equipment and appurtenances involved herein have *at all times material to this action* been and are now located.” (Emphasis added, R. 107-108)

Thereafter, the trial court entered its finding that the plaintiff had not sustained that burden and had not proved payment of the future ascertainable installments (Finding II, R. 108).

There can be no question that these appellants were the owners of the tracts underlying their respective buildings since the unchallenged findings and supplemental findings of fact establish that fact.³

B. Error arises from confusion in reading findings of Oct., 1955, and supplemental findings of April, 1956

Finding XII, Oct., 1955 (R. 70) recites that the lands were taken under original condemnation, under which the plaintiff was granted a right annually to re-

-
- ³ 1. Finding XI (R. 68) states: “That the owners of each of said buildings and real properties upon which each is situated are as follows: “c.” described the land owned by Barnett & Owens (R. 69); “d.” described the land owned by Ester (R. 70).
 2. Finding XII (R. 70-71) is that the appellants acquired their respective interests in the lands after the date of the contract to remove the buildings.
 3. Findings XIII and XIV show that Barnett and Owens and Ester acquired the lands (R. 71-72).
 4. “. . . the said defendants being the owners of the real estate involved in this action and identified in Paragraph XI of the findings of fact . . .” (R. 107, introduction).
 5. The interest of the plaintiff is recognized as only a claim by the trial court which states, “That the present and only estate in the land here in question *now claimed* . . .” (Supplemental Finding III, R. 108. Emphasis added).

new its exclusive use and that the government had filed timely notice yearly of its intention to renew said exclusive use, the current use extending to Feb. 21, 1956. *The supplemental findings I and II (R. 107-108) of April, 1956, completely amended this latter portion of original finding XII and established the unchallenged fact that the plaintiff had not proved payment of just compensation at all times material to this action and that it did not have the right to exclusive possession.* Consequently it follows that, if at all times material the government had not paid its compensation, its attempts to renew exclusive use are futile. It is respectfully suggested that it is the renewal portion of Finding XII which has misled the appellate court into making footnote 3, page 2, of its opinion, stating "The government subsequently terminated its use as of June 30, 1956."

Not having proved payment of decreed just compensation for the right to renew the annual term (or for any term material to the action) the plaintiff had nothing to terminate. *U.S. v. General Motors*, 323 U.S., 373. 376, ftn. 3 at 377.

The circuit court was compelled to obtain its facts by references back and forth between the original findings of Oct. 21, 1955 (R. 62-74) and the supplemental findings of April 26, 1956 (R. 107-111). Supplemental finding VII (R. 110) stated:

"that the Findings of fact and Conclusions of Law entered Oct. 20, 1955, are reaffirmed in their entirety except that they are modified only as to the specific details enumerated herein."

The error which now concerns these appellants creeps

in at the circuit court opinion, page 2, paragraph 3, where it is stated:

“Under the terms of the judgments fixing compensation in the condemnation acts, the United States was given the option to renew its exclusive use from year to year, not to exceed three years after the termination of the national emergency. The government filed timely notice, yearly, of its intention to renew its exclusive use, extending to February 21, 1957.”

This appears to come from the Oct., 1955, findings II (R. 63) and XII (R. 70). But the trial court in its introduction to the April, 1956, supplemental findings of fact and conclusion of law states:

“... from a preponderance of the evidence, by way of supplement and amendment of the Findings of Fact and Conclusions of Law heretofore entered herein on Oct. 20, 1955, makes the following supplemental and amendatory: Findings of Fact.” (R. 107)

Thus original findings II and XII were amended by the clear supplemental findings I and II (R. 107-108) that just compensation had not been paid; therefore, the plaintiff could not have held continuous exclusive use of the land “at all times material to this action” (supplemental Finding I, R. 107-108); nor could the plaintiff have renewed for the applicable periods in the action since by the supplemental findings I and II (R. 107-108) the trial court plainly found “That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the land . . .” and “That the plaintiff has not fully sustained that burden . . . the plaintiff has not proved that the future ascertain-

able installments of such just compensation have been paid . . .” and that the court cannot find such payment and that “This finding is based upon the necessity of the plaintiff establishing in this action, its exclusive right of possession of said real estate.”

There can be no question that the plaintiff failed in its necessary proof; that it did not have exclusive possession; that it did not pay just compensation; that it therefore had no renewal right.

Supplemental Finding III (R. 108) could also have misled the court inasmuch as the contents thereof are not findings but merely a recitation of the trial court’s reasons for substituting monetary relief. The trial court had already made a finding that the plaintiff had failed in its proof. The trial court was still seeking a way to make these appellants liable on the contract. The trial court was not in this finding attempting to recognize any present interest, other than a mere claim, to the tracts belonging to these appellants as owners. The appellate court, in its opinion, page 5, last paragraph, recognizes the trial court’s reasoning process based on the failure of the plaintiff to prove its continued right to exclusive possession.

C. A further explanation

In Supplemental Finding of Fact II (R. 108) is the statement that:

“ . . . the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid . . .”

In using that language, after having already found

that the plaintiff had not shown its right to exclusive possession "at all times material to this action," the trial court was referring to the "future ascertainable installments of just compensation" required by the amended decree of condemnation in the form of annual rents payable *at all times material to this action*.

Originally, in the condemnation proceeding under which the plaintiff took a leasehold interest in the properties, with an option to renew the term from year to year, there was to be paid a fixed amount each year. The original condemnation judgment was amended frequently. The amended judgments were based on stipulations between plaintiff and the owners of the lands involved. These amended judgments provided for the payment of an annual rental, which was a stated sum of money, together with an amount equal to the real estate taxes (See Exs. A-32, A-30, A-34, A-35, A-36, some of the amended judgments for the properties of Barnett, Owens and Ester).

When the trial court entered its Supplemental Findings of Fact and Conclusions of Law, it was referring to "future ascertainable installments of such just compensation" provided for in the amended condemnation judgment. This becomes clear when reference is made to the original documents (R. 126) filed herein:

Document 120, affidavit of Arthur G. Barnett, filed 4/12/56;

Document 121, affidavit of F. N. Cushman for United States in opposition to Motion of Defendant Barnett, filed 4/19/56;

Document 122, Second Supplemental Trial Memorandum of Plaintiff, filed 4/19/56;

Document 124, Supplemental Trial Memorandum of defendants Barnett and Owens, filed 4/20/56; referring to the then required payments of annual rental which included real estate taxes. Inasmuch as real estate taxes under Washington law (RCW 84.60.020) become a lien from and after the 1st day of January, the point the court was making was that the taxes were "ascertainable" prior to February 21 of each year, which was the renewal day of the leasehold terms under the condemnation judgment.

The amount of the compensation to be paid by the plaintiff, which included the real estate taxes for 1954, could not be "ascertained" in 1950, for example. But the amount was ascertainable after January 1st of any year, and prior to February 21st, when a new term began. So, when the trial court spoke of "future ascertainable installments of such just compensation," it was referring to the amount awarded under the amended judgment of condemnation which included real estate taxes for the year of the new term beginning on February 21st.

With this in mind, the Supplemental Findings of Fact become clear (R. 107, 108).

"That it was incumbent upon the plaintiff herein to prove its exclusive right of possession . . . at all times material to this action.

"That the plaintiff has not fully sustained that burden in that, although the judgment on the declaration of taking and the judgments awarding just compensation were valid, the plaintiff *has not* proved that the future ascertainable installments of such just compensation have been paid . . ."
(Emphasis added)

In other words, the plaintiff had failed to prove paragraph VIII of the complaint wherein it alleged "that the plaintiff, . . . at all times herein mentioned, had and does now have exclusive use of said real property . . ." (R. 8) (Br. of Barnett, Owens and Ester, p. 29). The trial court having found that plaintiff had not proved this allegation could not have allowed ground rent for trespass or implied a contract for rent against the owner of the land, so, instead, the court decided on damages in lieu of specific performance.

The plaintiff did not seek a new trial. The government was the first to file its appeal from the decision of the trial court but, on its own motion, dismissed its own appeal. Where there is a failure of proof in the lower court as to the plaintiffs' title, should it be allowed to reopen for the giving of proof in the same action wherein it failed? It did not furnish the proof when requested by the lower court during a two weeks' continuance granted immediately prior to the entering of the supplemental findings of fact (documents 121, 122 by the U.S.; documents 120 by Arthur G. Barnett and 124 by Barnett and Owens). The plaintiff failed to prove the allegations of paragraph VIII of its complaint (R. 8).

CONCLUSION

It is submitted that, under the unchallenged findings of the trial court, the plaintiff failed to prove its right to the exclusive possession of the real estate at all times material to this action, and that, as a result, there is and can be no liability on the part of these appellants for damages for trespass or on the theory of an implied contract to pay rent.

Respectfully submitted,

VERNON W. TOWNE
ARTHUR G. BARNETT
ALEC DUFF

Attorneys for Appellants.

CERTIFICATE

Come now VERNON W. TOWNE and ARTHUR G. BARNETT, attorneys for joint appellants Arthur G. Barnett and Donald F. Owens, and Edward R. Ester, and their respective wives, and do hereby certify that in our combined judgment the petition for rehearing by these appellants is well founded and that it is not interposed for delay.

Dated this 30th day of November, 1957.

VERNON W. TOWNE
ARTHUR G. BARNETT

*Of Counsel for the
Above Joint Appellants.*

